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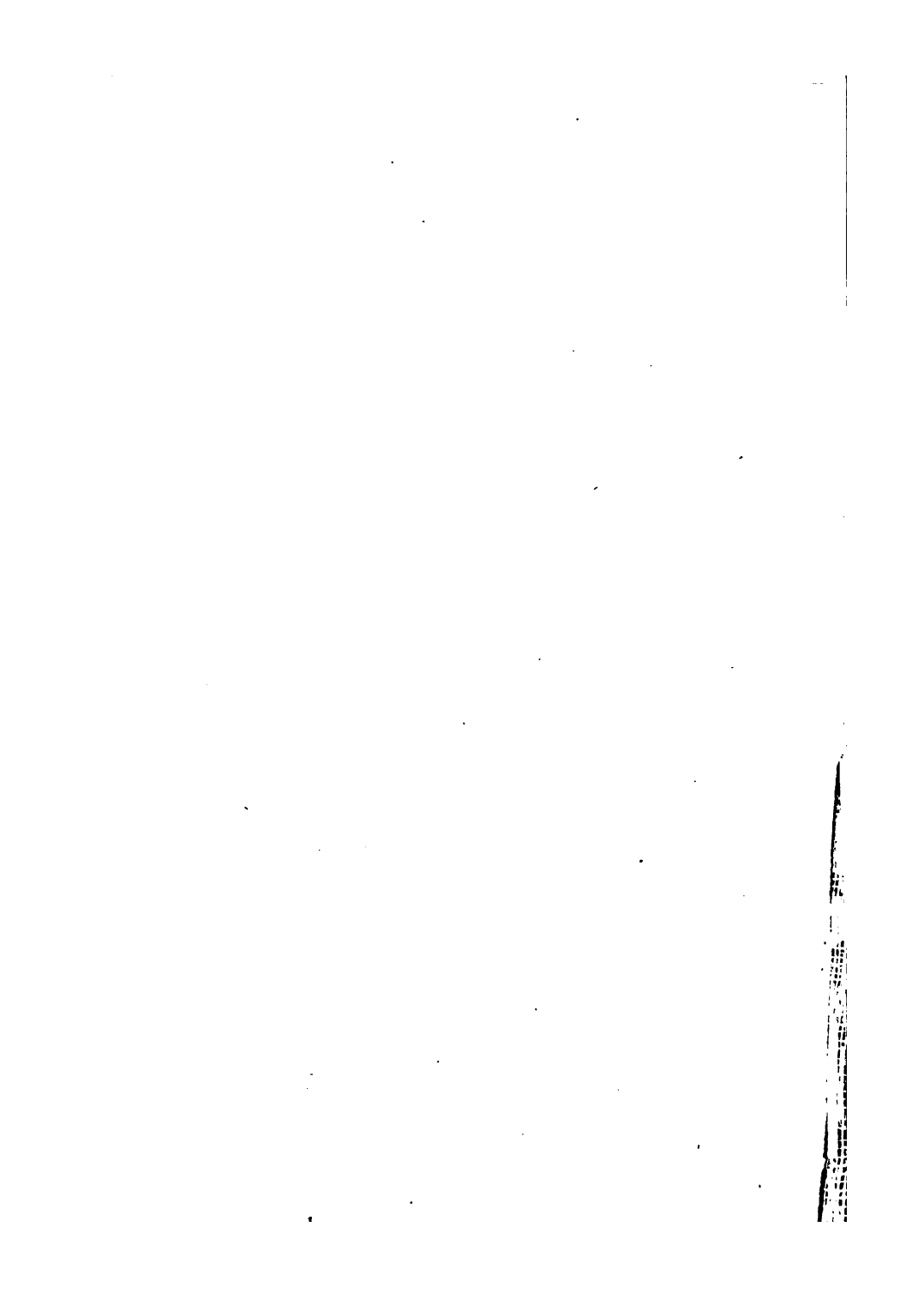

ENGLISH

CONSTITUTIONAL HISTORY

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OUTLINES

OF

ENGLISH

CONSTITUTIONAL HISTORY

FOR THE USE OF STUDENTS

BY

B. C. SKOTTOWE, B.A.

NEW COLLEGE, OXFORD

Oxford

JAMES THORNTON, HIGH STREET

1881

PREFACE.

THE OBJECT of this book is to assist beginners in reading Constitutional History, by arranging in order outlines of the growth of the most important institutions. These outlines, it is scarcely necessary to say, to be of any value must be regarded as a mere ground-plan for study in works of a far different nature, foremost amongst which naturally stands the learned History by Professor Stubbs.

I must not omit to thank those who have kindly assisted me with advice and criticism, and especially a distinguished Professor of this University to whom I am indebted for some valuable corrections.

OXFORD : *July* 1881.

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ENGLISH

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CHAPTER I.

FEUDALISM BEFORE THE CONQUEST.

I. INTRODUCTION.

ANGLO-SAXON society before the Conquest was passing through a process of change which may be described as a development of the **personal** into the **territorial** organisation or a movement from the early Teutonic to the **feudal** form of constitution. In PRIMITIVE times the basis of society was a purely personal one. The **freeman** is everything; he possesses his share of the land because he is free; the **whole body of freemen** in arms form the national defence; the king, if he exists, is the king of the race.

In the SECOND stage, which the conquest of Britain inaugurated, the purely personal basis no longer exists. The **possession of land** is the **badge**, not the consequence, of freedom; the host is the body of **landowners** in arms. But still the **landless** may select their lord, and there is **no indissoluble tie** created by such selection. The freeman, moreover, is the equal of the noble in all political respects. Thus the personal basis is not lost sight of.

The THIRD stage arose when **land** became the **sole basis of society**; when the lord owned the land which his vassal cultivated, and the vassal depended on him because of that ownership;

when the lord exercises **jurisdiction** in right of his landownership, and not on account of the choice of his dependent; when, lastly, the **king** is not only king of the nation, but also the **supreme landlord** of the kingdom.

This **third stage**, however, was **never fully attained in Anglo-Saxon times.** The personal basis is never fully lost sight of, nor did the king become the supreme landlord until the Norman Conquest brought feudalism **full-grown** into England, and crushed the varying tenures of Anglo-Saxon society into uniformity. The result of this process was a graduated system of dependence based entirely on land.

The tracing of the process of **change** under the **second** and **third** stages, is the problem of Anglo Saxon constitutional history, which is complicated by the fact that the **third stage was never fully completed.**[1]

II. ORIGIN OF FEUDALISM.

Feudalism was of distinctly **Frank** growth, originating in a MIXTURE of Roman law and Teutonic usage.

The Roman tenure of EMPHYTEUSIS consisted in a form of **double ownership.** The emphyteuta or tenant had the usufruct of the land without the ownership, which resided still in the lord. This tenure conveyed the most extensive rights almost amounting to property; but they **depended** entirely on the payment of some fixed rent or the performance of some fixed conditions.

'A practice arose in the later empire of granting out the **frontier lands along the Rhine and Danube** to soldiers or barbarian chiefs, on the condition that they should be always ready to defend the frontier when endangered.'[2]

These lands were therefore held by EMPHYTEUSIS on the condition of MILITARY SERVICE, the ownership still residing in the state. This **double form of ownership**, absolute and conditional, is probably the BASIS of the double ownership of the feudal tenure.

The barbarians who broke into the Roman world had long, while they remained 'poised on the edge of the Empire,' been brought in contact with Roman legal theories, and especially with the emphyteusis. **Many** of them had **held frontier lands on** THIS TENURE. When, therefore, the conquered lands were re-allotted to their followers by the barbarian chiefs, large gifts of land were made to the

[1] Stubbs, *Const. Hist.* i. 168.

[2] Digby, *Hist. of Real Prop.* ch. i.

important, or favourite warriors, in addition to the ordinary share. These gifts were the BENEFICIA.

The beneficiary was not the absolute owner. As in the case of the emphyteusis from which it was derived, the beneficium was held on the **condition** of the performance of certain services, of which military service was the most important.

The **benefice** was therefore merely the **Roman emphyteusis modified** by **Teutonic** custom.

This peculiar double ownership was not entirely due to the beneficia. The old allodial proprietors were gradually turned into the vassals of the invaders by the process of COMMENDATION. This consisted in surrendering the allodial lands to some powerful warrior, to be received back under the condition of rendering military service. This tie would be entered on by the allodial proprietor in order to save himself from **spoliation**, or to acquire a **protector** during the violence of the Middle Ages.

From these two processes, the **Beneficiary system** and **Commendation**, arose feudalism, or a graduated system of society in which every member depends on some superior, the basis of this being land, and the tie between the parties being the act of **homage**, by which the tenant acknowledged his lord as him of whom he **held** his land, and to whom he was bound to **render service**; and from which also arose the duty on the part of the lord of **protecting** his tenant.

Anglo-Saxon feudalism, such as it was, originated in a very DIFFERENT way. The territorial theory, moreover, never entirely superseded the original purely personal basis.

III. ANGLO-SAXON LAND TENURE.

I. Primitive Teutonic.

The earliest form of holding was the **Mark system**, by which a community held their lands in COMMON, and not as individual proprietors.

The MARK is the name given to the land of the community, which belongs to the community as a body. In the centre of it lay the village, in which each member of the mark possessed a house, yard, and farm-buildings. Each member of the mark had a right to an equal **share** in the **arable land**, which was allotted **annually**, and also to the **use** of the pastures and waste land. The arable land was shifted every year at first, and a fresh

allotment made, but later the arable surface remained fixed, subject to the alternation of crops. Thus each man had a right, not to a fixed portion of land, but to an **equal share of the whole.**

'This system of husbandry is in complete harmony with the idea of a nationality constituted on a basis of **personal**, rather than territorial relations.'[1] It prevailed at different times over the whole of Germany, but it did not exist in its original purity at the time when Tacitus wrote, and it **never really existed in England**, though many TRACES are to be found of its influence in the common holdings of the township, and later of the manor. The history of the mark system therefore does not belong to English history, though it forms a valuable introduction to the study of Anglo-Saxon land tenure.

ii. Early Traces of Dependence.

The sketch of **Tacitus** shows that in the Teutonic communities of the time at which he wrote, there were **germs** which, though in themselves they in no way constituted any approach to feudalism, merely required **development** under favourable circumstances to form a system of graduated dependence strongly resembling that of the feudal system.

1. The most important of these was the **comitatus.** This was a body of warlike companions, or comites, bound in the closest possible manner to the leader, or princeps, whom they might have selected. It was their duty to follow him to war, to fight for him, and to emulate his deeds. It was his duty to entertain them, to equip and arm them, and to lead them to battle. The tie which bound these comites to their princeps was the purely PERSONAL one of HONOUR.

2. There were also other **dependent classes** —

   a. The rich man, who had acquired a large estate, would let parts of it out to **coloni** (probably members of a subjugated tribe), who would be bound to pay their lord a quantity of corn, cattle, or clothing, as the rent of that land.

   β. Or the large landowner might cultivate his estates by means of **slaves.**

It is evident, therefore, that this state of dependence, being

[1] Stubbs, *Const. Hist.* i. 50.

purely **personal**, and in no way based upon land, **was not feudal** in any sense.

The **comitatus**, however, contained the **germ of feudalism**; for their leader 'has but to conquer and colonise a new territory, and reward his followers on a plan which will keep them **faithful as well as free** (*i.e.* by grants of land), and feudalism' of a more or less perfect kind 'springs into existence.'[1]

The COMITATUS in fact WAS THE BASIS OF ANGLO-SAXON FEUDALISM.

iii. The Settlement in England.

The settlement of the land after the Saxon conquest was accomplished in four ways:

1. **Families** might settle on some portion of the conquered soil, establishing themselves on the village system of their native country, and holding the land they had seized on a **common** tenure.

2. When any particular district had been thoroughly conquered, the leader of the conquerors would **divide** the land among his followers on the principle of a hide to each family, and would most probably CONFIRM to those families, who had already established themselves, the land on which they had settled. As, however, it was improbable that the conquerors would be enough to colonise all the land of the district, the surplus would be reserved as the common property of the community by the name of **folcland.**

3. From this **folcland**, which would at first be of no value, and hence little regarded, the leader, now become king of the conquered district, would **grant** out large estates to his **comitatus** as a **reward for past service** and a pledge of fresh. The comitatus, however, did not enter on any new obligation in consequence of this grant. They received the land as a reward, and were still merely bound to military service by the old personal tie of honour.

4. Grants, moreover, would be made to other great men, besides the comitatus, on **condition** of their entering into the same personal relation towards the king, which the comitatus held; and great men, who had seized on large tracts of land, would be glad to secure their title by entering into this same relation.

Thus the grades of society shortly after the conquest would be—

[1] Stubbs, *Const. Hist.* i. 35.

1. The KING (who is not the supreme lord of the land, but merely the **head** and representative of the tribe, and especially the leader of the comitatus).

2. The NOBLES (who consisted of the **comitatus**, whose ranks were largely **increased** by grantees of folcland, and those who had purchased a title by attaching themselves to the king in this way, who were all large landowners and were bound to the king by ties of **honour**).

3. THOSE OF NOBLE BLOOD (who might belong to class two if wealthy, or class four if not; who were only distinguished as a class by wergild, and who tended to be gradually **absorbed**).

4. The FREEMEN (who were either arranged in families, holding their lands in common, and gradually developing into the townships; or, as was more general, holding their lands in separate and absolute ownership).

Thus far, therefore, the **basis of society** was still a purely **personal** one.

iv. Development.

1. There seems to have been a tendency to the accumulation of great estates in the hands of individuals, and this was owing to—

α. **Deaths**, which united several small estates in one.

β. **Grants of folcland**, which continually increased as conquest increased this surplus land. These grants were confirmed by a charter. The land was therefore called **bocland.**

The result of this was that it became necessary to cultivate these estates by means of **dependents**. The great landowners therefore **leased out** their lands to freemen, who cultivated it on fixed conditions.

There was therefore a **personal relation** between the inferior and the lord, who was also bound by ties to the king; and thus a **regular system of dependence** was formed.

2. The KING, moreover, could lease out folcland without consulting the Witan (which preliminary was necessary to all grants of bocland), and the lessees could similarly lease it out to inferiors.

3. Police regulations required that the **landless** or **kinless** man, as he had no land or kin for the law to hold responsible for his acts, should select for himself a landed proprietor for a **lord**, who should be answerable for him, and who in consequence fre-

quently had rights of jurisdiction over him. This relation of dependence, however, was merely **personal**, and could be **dissolved** at the will of the dependent, provided he selected for himself another lord.

4. **Freemen**, moreover, were often induced by the desire for **honour** or **protection** to become dependents on the king, ealdormen, or bishops, and the latter motive was especially influential during the **Danish wars.**

5. The **comitatus** assumed gradually a **different character.** The military thegns who have become great landowners by the favour of the king, and who are bound by oath to military service, gradually eclipse the gesiths, or servants, who are either absorbed in the thegnhood or become mere servants. All possessors of five hides, moreover, are thegnworthy, and are bound to military service as landowners. When, therefore, the **Danish wars obliterated the distinction** between king's thegns and other landowners by compelling the king to call them all to arms, the thegns became a consolidated class of landowners bound to military service, but still **not holding their land on any condition** of military service. The tie, in fact, was still a personal one.

The result of this development was to create a number of **dependent classes** bound to one another by various ties founded on the possession of land. But still the feudal idea of **tenure was totally absent.**

E.g. *a.* The **thegn** owned land. Therefore he was bound to military service. But he did not hold his land on the condition of military service with a liability to forfeiture on failure of that condition.

β. The **landless** man was compelled to have a lord. Still he could choose whom he would have, and he could change his lord at will.

γ. **Commendation** created no permanent tie and no double ownership. The dependent surrendered his land and received it back again; he then owned it and was bound to certain services; he did not hold it on condition of rendering those services.

The relations, therefore, between vassal and lord in every case is still really a **personal** one, though it is very difficult to distinguish it from a territorial or feudal one.

v. Growth of the Territorial Theory.

1. The **consolidation** of the kingdom under the West Saxon kings, and the union of the three Anglian, Saxon, and Danish

nations under one head, tended to enhance the **personal dignity of the king**, and at the same time to bring him into **closer relations with his people.** He becomes lord of the whole nation; the peace becomes his peace; and offences against the law become offences against the king. This increased power of the king, and the strengthening of the tie between him and his subjects, is shown by—

a. The enactment of the first law of **treason** by Alfred.

'If any plot against the king's life, let him be liable in his life and all that he has.'

β. The **oath** taken to the king by each of the provinces as they were conquered. The **East Anglian Danes**, 921, submitted to Edward as their lord. The **Cambridgeshire people** chose him as their lord. Under **Edmund** the oath of fealty is generally imposed. The submission of the **Danes**, and the exaction of an oath from them, involved the strengthening of the tie between the king and his other subjects by the same means.

γ. In the time of Alfred the **charters** granting bocland frequently **do not contain the clause** reciting the counsel and consent of the Witan. It seems probable, therefore, that this was no longer needed; the folcland was rapidly becoming the king's **demesne**, which he could grant out without consulting the Witan.

The result of this was to **exalt the position of the king immensely**; to make him the lord of the whole nation individually; to make him, if not lord of the whole land, at least lord of all the public land and bocland; and to **place** him in a **position** with regard to the **holders of bocland** which involved mutual rights and duties near akin to those of lord and vassal.

2. The **folcland** having become the **king's demesne**, every holder of bocland or folcland became bound to **special military service**; not the liability of every man in the king's peace to be summoned to the fyrd, but as the special vassal of the king, and for **all** military service, not merely for national defence. The original nobility, therefore, the comitatus of gesiths and thegns, bound to special service, has extended itself so as to include all holders of bocland or folcland, and forms a **great territorial aristocracy, bound to special military service**, and united to the king by a **special oath.** THE CAUSE OF THIS RELATION IS, MOREOVER, THE POSSESSION OF LAND, THOUGH THE ACTUAL RELATION IS STILL A MERELY PERSONAL ONE. This tie is drawn still closer by the fact that the king alone has the right of jurisdiction over

the holders of bocland; and thus a **feudal element** is introduced by the growth of the theory that liability to jurisdiction accompanies the possession of land. This territorial and official nobility has, moreover, entirely swamped the old blood nobility of the conquest.

3. All **grantees of bocland**, or **holders of folcland**, had the right of leasing out their lands to dependents; the grantees of bocland could, moreover, make regular grants to dependents, who would become their vassals, bound to special or military service, much as they themselves were bound to the king. **Grants of jurisdiction** (or sac and soc) cut out of the local courts were frequently associated with grants of land, and at last, under the feudalising tendencies of the later Saxon period, all **owners of bocland had jurisdiction** over their dependents of all kinds whatsoever. The **tie** between the holder of bocland and his vassal would thus be feudalised, and strengthened much as the tie between the king and the holder of bocland was. A **regular system of dependence would thus be established, based on the possession of land, and cemented by liability to jurisdiction**; BUT STILL THE ACTUAL TIE WOULD BE A PERSONAL ONE, though extremely difficult to distinguish from a feudal one.

E.g. **Ang. Sax.** The vassal **owned** his land and transmitted it to his son by **allodial** right. He was bound to military service; but did not hold his land on a tenure of military service. If he failed to perform his service, he forfeited his land; but this was merely a **punishment** for disobedience, **not a penalty** following the breach of a condition.

Feudal. The vassal **held** his land on a condition, the breach of which involved forfeiture. His **lord owned** the land, and, on breach of condition or death of tenant, the lord's right entered in again, though he was bound in the latter case to make a regrant to the heir on payment of the customary relief.

E.g. **The heriot.** On the death of an Anglo-Saxon the lord demanded a heriot, which was paid in kind or money. This heriot was a **relic** of the **comitatus**, and represented the **surrender** by a comes on his death, of his **arms and equipment** to the lord who had provided them. It was in no way a recognition of any right of the lord to the land. The vassal **owned** his land and transmitted it to his son. His relation to his lord was a **personal** one, and must be renewed by the son personally in order to continue.

The relief was a recognition of the right of the lord to the land on the death of his feudal vassal, and was a **fee** paid by the heir for a regrant. That is, the possession of the heir did not begin when his father died, but when he had paid the relief and performed homage; whereas the possession of the Anglo-Saxon heir began from his father's death. **The heriot was paid by the dead man; the relief by the dead man's son.**

4. This tendency to a system of graduated dependence was **assisted** by **two** influences;

a. If the simple freeman were too poor to provide the arms necessary to enable him to fulfil his duty of military service, he could **commend** himself to some more warlike neighbour 'who, in consideration of his accepting his superiority, would undertake the duty which lay upon the man's land.'[1] Thus he would become a **secager, paying rent,** and dependent on the lord who did his service.

This relation during the Danish wars was frequently entered into by the small freemen to obtain the **protection** of the great lords.

β. The law of Athelstan, enlarged by Edgar, and rëenacted by Cnut, required that **every man should have a surety,** who should be bound to produce him in case of **litigation,** and answer for him if he were not forthcoming. This extension of the old law, that every landless man should have a lord, testifies to the growth of the great franchises, and the increase of the power of the great landowners at the expense of their inferiors, while at the same time it tended greatly to extend the system of dependence based on land.

'When[2] therefore **every man** who was not by his own free possession a fully qualified member of the commonwealth, had of necessity to find himself a lord;

'When the **king** had asserted for himself the position of lord and patron of the whole nation;

'When **every freeman** had to provide himself with a permanent security for his appearance in the courts of justice, of which the king was the source, and for the maintenance of the peace, of which the king was the protector;

'When **every owner of bocland** had the right of jurisdiction, and the king alone could exercise jurisdiction over the owner of bocland;

'The relation between the small landowner to the greater, or to

[1] Stubbs, *Const. Hist.* i. 193. [2] *Ibid.* i. 188.

the king, and the relation of the landless man to his lord, created a **perfectly graduated system of jurisdiction, every step of which rested on the possession of land** by one or both of the persons by whose relations it was created.

'As soon as a man found himself obliged to suit and service in the court of his stronger neighbour, it needed **but a step to turn the practice into theory**, and to regard him as holding his land in consideration of that suit and service.'

This STEP, HOWEVER, WAS NEVER REALLY TAKEN IN ANGLO-SAXON TIMES; and though the system of land tenure seems to approach nearer and nearer to the territorial feudal system; though the great franchises grew at the expense of local liberties; and though the division of the kingdom into great earldoms, and the concentration of all power in the hands of a few great nobles, seems to establish a disintegration of feudalism similar to the state of France under the early Capets; yet the **personal basis is never really lost sight of**, the king never becomes the supreme landlord of the kingdom, and the tie between lord and vassal never entirely becomes of a territorial or feudal character:

E.g. *a.* The **landless** man or the small freeman were compelled, it is true, to have a lord, but he retained the right of SELECTING him, and the tie created was not necessarily permanent.

β. **Commendation** similarly did not necessarily create permanent relations; the commended, moreover, still OWNED his land and never really held on a tenure of performing any service.

γ. The breach of the **fyrd** was never regarded as a breach of the condition on which a man held his land; but was punished as a BREACH OF THE CHARACTER OF A FREEMAN.

δ. The **heriot** to the last remained A GIFT FROM THE DEAD MAN, excluding the idea of a breach in the continuity of allodial possession.

ε. There is **no idea of a double ownership**, of the tenant conditional, and of the lord reversionary, such as is found in the feudal theory and in the Roman emphyteusis.

CHAPTER II.

ANGLO-NORMAN FEUDALISM.

I. INTRODUCTION.

The THIRD STAGE in the series of steps which mark the movement from the personal to the territorial organization was passed at the NORMAN CONQUEST when **feudalism was brought full grown** into England, and, after some important modifications, crushed down on the varying Saxon tenures till it ground them into uniformity.

The result of this process was that the **personal tie** which had survived the feudal impulses of the later Saxon period, **entirely disappeared** :—

'LAND[1] becomes the SACRAMENTAL TIE of all public relations;

1. 'The **poor man depends on the rich**, not as his chosen patron, but **as the lord of the land he cultivates**, the lord of the court to which he does suit and service, the leader whom he is bound to follow to the host;
2. 'The administration of law depends on the peace of the land rather than that of the people.
3. '**The king** still calls himself the king of the nation, but he has added to his old title new and cumbersome obligations towards all classes of his subjects, as **lord and patron, supreme landowner**, the representative of all original, and the fountain of all derived, political right.'

II. PROCESS OF CHANGE.

This was **slow and gradual**; no sudden legislative revolution swept over the land and annihilated all the ancient tenures substituting new ones; or at least **we have no evidence of such a convulsion, while there is strong evidence to the contrary**. Take **Domesday**, the great record, which was to establish the relations between the king and his landholders; there is not a single service or payment reserved, except the pecuniary payments, the Danegeld, which had been rendered in the Anglo-Saxon age. If more land was brought into cultivation, more was paid; if less, less. Domes-

[1] Stubbs, *Const. Hist.* i. 167.

day, which was to establish all the territorial rights of the crown, is entirely SILENT as to the feudal **dues and tenures**. Later, moreover, when the **officers of the Exchequer in the reign of Henry III.** wished to find some definite account of the establishment of the feudal tenures in order to facilitate the execution of their business, they were unable to do so; nor was there any roll or record of the age of the Conqueror in existence except the Domesday survey. The **author of the 'Dialogus de Scaccario'** in Henry II's time, though he fully expounded all the business of the Exchequer and the intricacies of the revenue, has stated nothing **definite** concerning it and seems to argue that such documentary evidence did not exist before his own time. **The inference obviously is that there was no one written document testifying to the creation of military tenures**; and that they were really a development of customary usages: some gradually reduced into regularity by the decisions of the courts of justice, others by compromise between the subject and the crown.

The **rendering of a military service** in consequence of the possession of land held from the sovereign was the characteristic of the **thegnhood** when it had assumed its later territorial aspect, and had to some extent put off its early purely personal relation to the king. **William retained this obligation** when the same lands were handed over to his followers, and thus the land was liable to the same obligation in the time of William as it had been under Edward; and **in this way alone** can the extraordinary fact be **explained** that Domesday makes no direct allusion to any military tenure.

But at the same time the feudal tenure of land, the DOUBLE-OWNERSHIP (of the lord, reversionary; of the vassal, conditional), was the **only one** that the Norman could **understand**. In their theory, the king was the supreme landlord, and every title issued from him originally, every such title being conditional and liable to forfeiture on breach of that condition. The **Norman knight**, therefore, who received lands to which was attached the obligation of military service, would **imagine that he** HELD **them on the condition** of performing military service, and that if he neglected to fulfil the condition he would forfeit his land, not would lose it as a punishment. The **Saxon**, on the other hand, who redeemed his lands from the Conqueror, would **imagine that he still** OWNED **them as before** with the old obligation of military service; but the **Norman lawyer would see in this redemption a forfeiture and a regrant on the tenure** of military service, with the liability to perform all the incidents of that tenure.

The repeated **confiscations** and **regrants** which followed, and which were generally confirmed by charters, tended to **facilitate** the growth of the theory by the increase of the Norman land-

owners; while the Saxons, though they might not recognise their legal position, would be compelled to act up to it.

The steps of this change are therefore four—

1. The **Frankish system** of tenure is **assumed** by the Normans to be the only **lawful** and **reasonable** one, and therefore is **gradually substituted** for the Anglo-Saxon one by the **insensible process of enclosure**; for the change being more one of theory at first than of fact, is not at first perceptible to the Anglo-Saxons.

2. Revolts, executions, and confiscations remove a large number of Saxon proprietors, and tend to **swell the numbers and importance of those who hold by the feudal theory alone,** diminishing the conservative party who held by the old custom, and leaving it so weak that its opposition is practically unfelt.

3. **The uniform feudal theory takes the place entirely of the complicated Anglo Saxon-tenures.** 'The[1] fifteen hundred tenants-in-chief of Domesday take the place of the countless landowners of Edward the Confessor;' and the loose unsystematic arrangements which had grown up in confusion of title, tenure, and jurisdiction, were replaced by **systematic custom.**

4. **Floating custom becomes defined into law.** This did not take place till the reign of **Henry II.**, when the organisation and development of the **Curia Regis** and the judicial system as a whole exercised a hardening and defining tendency on the customary law which followed the Conquest, and which varied in its details in every province. '**The[2] practice of recording decisions given by men who became in fact professional judges,** the discussion and sifting of points of law, the desire to attain to uniformity of legal rules throughout the country,' which were all characteristic of this period, tended to simplify and consolidate the uncertainties of customary rules into a regular body of law, by which local custom was in general overridden.

Therefore it is not till the time of **Henry II.** that the **feudal dues** of particular tenures begin to be regularly defined and to become oppressive from their extensive character.

[1] Stubbs, *Const. Hist.* i. 259.
[2] Digby, *Hist. of Real Prop.* ch. i.

III. THE REAL CHANGE.

I. Theory of Tenure.

The **real change** at the Norman Conquest which in the long run altered the entire territorial system was the development of the idea of **Tenure**.

This **theory**, derived from the Roman emphyteusis, involved the idea of a **double ownership**; the **vassal held** his land from his lord on the condition of performing some fixed service, the failure to perform which rendered him liable to forfeit the estate; the **lord** had a **reversionary interest** in the estate, which entered in at the death or forfeiture of his vassal, though in the former case the lord was bound to regrant the land to the vassal's heir on payment of the customary relief.

E.g. 1. The Saxon vassal **owned** his land; the Norman vassal **held** it on some condition.

2. The Saxon, therefore, was **not** liable to **forfeiture**.

The Norman was.
But still the Saxon would be punished for any crime, such as neglecting the fyrd, by the confiscation of his land.

3. The Saxon was bound to render military service to the king, **because** he owned land;
The Norman was bound to military service as the **condition** of his tenure.

4. The Saxon lord had **no rights of ownership** over his vassal's land;
The Norman had a **reversionary right**.

5. The Saxon **heriot** was a present from the **dead man** to his lord; the heir succeeded by allodial right;
The Norman **relief** was a fee from the **heir** for a regrant of the estate.

The tie, moreover, between lord and vassal became much **more stringent and solemn**, and their duties towards one another became more carefully defined and more impossible to get rid of. This was owing to the introduction of the solemn ceremony of **homage**.

E.g. In consequence of the giving and receiving of homage by vassal and lord;

1. The tenant acknowledged the lord as him of **whom he held**

his land; to whom he was bound to render suit and service, and **whom he was bound to follow to war.**

2. The lord, on the other hand, recognised the tenant as **one whom he was bound to protect.**

3. Both parties were only **bound to their respective shares of the contract as long as the other duly fulfilled his part.**

This change, then, was NOT effected by any definite legislation. Norman men and ideas mixed with English, and **modified** or **supplanted** them, the result being the Anglo-Norman feudal tenures.

Before the Conquest **duties** had frequently been imposed on the holders of land, whether of a military or some other character. When the Conqueror regranted these lands he made, as a rule, **no change** in the duties owed by the land, and so to the Saxon mind no change would seem to have been effected.

But to the Norman lawyer, or even the Norman soldier, the **duty** owed by the land **would seem the service by which the land was held of the king**, and thus the feudal idea of tenure would be introduced.

E.g. 1. The **duty** imposed on every five hides of furnishing a fully armed man would become **tenure of land by the service of providing a man-at-arms.**

2. The **duty** of attendance at the lord's courts would become **tenure of land by suit and service.**

3. The not indissoluble relations between commended and lord and the consequent **duty** of military service attached to the former's land, would be transformed into the more permanent tie involved in the **tenure of land by military service.**

The old Saxon personal relation between **lord and man** is thus **merged** in the relation of **lord and tenant.**

II. Tenures.

In consequence of the introduction of this definite legal theory of tenure, the old modes of holding land were tending to become **species of tenures**, and acquiring regular technical names.

E.g. 1. **Frankalmoign.** 'Lands[1] held by **religious houses**, which before the Conquest were always free from all temporal service except the **trinoda necessitas**, are now

[1] Digby, *Hist of Real Prop.* ch. i.

said to be HELD by the TENURE called LIBERA ELEEMOSYNA (free alms or frankalmoign). It is, however, still regarded as free from all temporal dues, and the religious corporation is only bound to spiritual service.'

2. **Grand Serjeanty.** 'The[1] **services due to the king**, which if rendered to one of less exalted rank would have been considered degrading to a freeman, were still in the time of Domesday rendered by the TAINI REGIS (king's thegns), but were no doubt becoming connected with the holding of land, and passing into the exalted TENURE of MAGNUM SERVITIUM, or grand serjeanty. These lands could only be held from the king.'

3. **Knight Service.** The **landowner** bound to the **trinoda necessitas** becomes the **tenant in chivalry** (**per militiam**), bound to furnish a knight (**miles**), and holding his land on this condition. This tenure is not very general in Domesday, and the origin of it is very obscure; it no doubt arose gradually, like the other feudal usages, and **originated in the Saxon custom of the connection of land and military service.** The wording of the Domesday survey seems to imply that there was NOT much difference in the AMOUNT of obligation imposed on the same LAND under the old custom and under the new, for the land is marked out into HIDES, not into knight's fees. This tenure probably arose **first** between the **king and his immediate tenants** by confiscation and regrant, and was gradually extended.

Where the land is held **per militiam**, every portion of it amounting to **£20 annual value** is called a **knight's-fee**, and is liable to the **service** of furnishing a knight. This division, therefore, into KNIGHT'S-FEES is evidently a RENTAL, not a territorial one.

Knight service was due to the **king** as lord of the land from his own **immediate dependents**; but as **King of England** it was also due to him from all the **dependents of mesne lords** to whom these mesne lords had made grants of land on this tenure. The TENURE of KNIGHT-SERVICE in fact ONLY EXISTS where MILITARY SERVICE is due to the KING; and then carries with it the incidents of wardship and marriage to the immediate lord. But NO **services rendered to the lord** himself, of whatever kind, will **constitute knight-service**, or will **convey** to him the incidents of **wardship and marriage.** The knight-service, therefore,

[1] Digby, *Hist. of Real Prop.* ch. i.

of the Conquest is evidently **founded** on the old principle of the TRINODA NECESSITAS, and not on the true feudal principle. This is the real explanation of the **oath at Salisbury**, 1086, which was intended to set a seal to this system when it was fairly advanced, and also of the RESERVATION OF ALLEGIANCE which invariably occurs in the oath of homage to a mesne lord.

4. **Manors.** The grants of land and jurisdiction comprehended in the words **sac and soc**, which conveyed the right of services in money, kind, and labour from all the landholders in the district, and imposed on them the duty of attending their lord's court instead of the hundred court, now were called **manors** (maneria), though no doubt **little change** was made at first in the nature of the dues or services exacted. But the **substitution** of the **Norman legal theories** for the **Saxon** would as usual result in the more exact definition of the **Legal relation** between the lord and the smaller landowners, greatly to the disadvantage of the latter in the long run. The **lord** would be held to stand in the **same relation** to the land of the district as the **king** fills in relation to all the **land of the kingdom.** 'All[1] rights over the land within the district which are not claimed by any individual are regarded as vested in the lord. The freeholders of land become his tenants; he is **not only lord of his men**, but he is **lord** of the **land**;' he is entitled to escheat on the failure of the tenant's heirs; the rights of pasturage on waste enjoyed formerly of right by tenants become rights enjoyed by **favour** on the **lord's waste**, and are regarded as servitudes on the lord's dominion.

IV. MANORS.

I. Tenants.

The tenants of a manor were divided into two classes, free and unfree.

1. **Free.**

a. **Knights**; bound to military service to the king.

β. **Socage tenants**; freemen bound to render other than military service, as money, produce, attendance at the lord's court, labour. These freemen therefore held on the **tenure**

[1] Digby, *Hist. of Real Prop.* ch. i.

of rendering such service. These **services were fixed and certain**, and no doubt the socager is the successor of the old allodial proprietor. They were **freed** from **military service**, and were only liable to aids and reliefs, and not to the other feudal incidents.

γ. **Burgage tenants**; these were freemen who held lands and tenements in **towns** by **socage** tenure. **Originally** this tenure was of **villein** socage, but the purchase of the **firma burgi** by the borough was usually accompanied by a **grant of freedom** from villein services, and the tenement was in consequence held on the sole **tenure** of payment of a share of the **burgage rent.**

2. **Unfree.**

The unfree tenants were employed on the lands retained by the lord.

In Domesday there were three classes of unfree:

α. The **Villein Regardant**, who held plots of land to a considerable extent; was not removable; **was bound to the soil and passed with it**; and could not remove to another man's manor. This **certain base tenure** eventually passed into the customary tenure called **copyhold.** This constituted **villein socage.**

β. **Villein in gross = servus**; a **mere slave** sold and transferred from one lord to another without being attached to any land. This constituted **pure villeinage.**

γ. **Cotarii** (**cotsetlæ** or **bordarii**); cottagers holding small plots of land. They tended to become **merged** in the **villein regardant.**

II. Courts.

1. **Courts.**—The most important part of a manor was its courts. In a **liberty** (a collection of several manors) or an **honour** (a liberty escheated to the king) probably only **one court** was held, but met as the court of each separate manor, and not as the court of the liberty, for there was no separate organisation. These courts were three in number:

α. **The Court Baron.**—Every manor had a court-baron (the **lineal successor** of the **township court**) which was the assembly of the FREEHOLDERS in which **by-laws** were made, and other **local business** transacted. In this court the freeholders were at once suitors and judges, and

hence the **continuance** of a **certain number** of free-holders in the manor was **necessary** to the **continuance** of the court and the **manor** itself, for 'the court baron is the chief prop and pillar of the manor, which no sooner faileth than the manor falleth to the ground.' The possession of this court carried with it EXEMPTION from the HUNDRED COURT. It exercised **civil jurisdiction** to some extent, and especially in all matters relating to the freehold lands within the manor.

β. **The Court Customary.**—This was the court in which the business of the VILLEINAGE was despatched, and does not become of importance till the tenure of COPYHOLD became general. It was the court in which the rights of copy-holders were decided, and in which all transfers of copy-hold land were transacted.

γ. **The Court Leet.**—In all those manors which were directly descended from the Anglo-Saxon jurisdictions of SAC AND SOC, or which had obtained an express grant of CRIMINAL JURISDICTION cut out of the hundred, there was also a **court leet**. This carried with it EXEMPTION from the criminal jurisdiction of the HUNDRED. If the lord had a grant of VIEW OF FRANKPLEDGE as well, his tenants were **excused** from attending the SHERIFF'S TOURN. The court leet further dealt with all offences and nuisances, and regulated the price of provisions, especially bread and ale. It is the court of all the RESIDENTS in the district, not merely of the tenants of the manor; and a stranger passing through may be compelled to serve on the leet-jury, his presence in the district being deemed sufficient residence.

Of these three courts, therefore, the COURT BARON dealt with CIVIL cases, and excluded the civil jurisdiction of the hundred; the COURT LEET dealt with CRIMINAL cases, and excluded the criminal jurisdiction of the hundred, and might exclude the SHERIFF'S TOURN if the lord had a grant of view of **frankpledge**; the COURT CUSTOMARY dealt solely with the affairs of the VILLEINAGE.

Henry II., however, greatly diminished these rights by the judicial regulations of the **Assizes of Clarendon** and **Northampton**, (q.v. NATIONAL COUNCIL, REPRESENTATION, **Sheriffs and Itinerant Justices**, page 46), by which he entrusted his JUSTICES with the power of entering any of the manorial courts; and also by allowing any man whose right to land was impugned, to have it decided directly in the CURIA REGIS instead of in the lord's court.

By these measures **he destroyed one half the power of the great nobles** by removing these exclusive rights of jurisdiction, which had enabled them to render themselves supreme among their dependants.

2. **Procedure.**—'There[1] is no doubt that the same principles of **procedure** were used in these **as in the popular courts**; the **juratores** and **judices** were there as well as in the shire and hundred; **compurgation** and **ordeal**; **fines** for non-attendance; the whole accumulation of ancient custom as well as Norman novelty.'

V. FEUDAL INCIDENTS.

Besides the duty of military service, various incidental rights and duties became attached to the tenure per militiam, which became of great importance:

1. AIDS.—There were three regular aids:

α. For **ransoming** the lord if he were taken captive.

β. For **knighting** the lord's eldest son.

γ. For **marrying** the lord's eldest daughter.

2. RELIEFS.—The payment of a certain amount **per knight's-fee** (which later was fixed at 100*s.*) on SUCCESSION.

3. OUSTERLEMAINS.—The payment of the **half-year's profits** to the lord on the MALE ward attaining **21** or the FEMALE ward **16.**

4. PREMIER SEISINS were an ADDITIONAL RELIEF to be paid to the king by **tenants-in-chief.**

5. FINES FOR ALIENATION.—Payments made to the king by **tenants-in-chief** alone for the right of **alienation.**

6. ESCHEAT.—The **reverting** of the land to the lord on **failure of the heirs** of the tenant.

7. FORFEITURE.—The **seizure** of the land by the king or lord for treason or crime which involved **corruption of blood,** so that nothing could be inherited from or even through the forfeited one.

8. WARDSHIP.—The right of **enjoying the profits** of the lands without accounting for them until the ward is 21.

9. MARRIAGE.—The right of disposing of the **female ward** in marriage as soon as she is 14; of enjoying the revenue of her

[1] Stubbs, *Const. Hist.* i. 400.

lands if she refuses, till she is 21 ; and of then withholding consent to her marriage at will. This right was, in the reign of **Henry III.**, by an iniquitous construction of the clause in Magna Carta, **extended** to **male wards** as well.

These rights, **except primer seisin** and **fine on alienation**, were enjoyed by the immediate lord of the tenant ; and of them the last two were infinitely the most important and oppressive.

CHAPTER III.

POLICY OF WILLIAM THE CONQUEROR.

I. INTRODUCTION.

The **feudalism** which existed in **France** at the time of the Norman conquest of England was feudalism **pushed to its logical conclusion**, and following entirely the **centrifugal course** which was inherent in its principles.

The THEORY was that a vassal owed fealty to his **immediate** lord alone, and was **bound by no tie** to his lord's lord. Thus between the King of France and the Duke of Brittany there were the relations of lord and vassal ; and between the Duke of Brittany and his dependants there were the relations of lord and vassal ; but **between the King of France and the dependants of the Duke of Brittany there were no relations of this kind** :—

E.g. If the duke renounced his allegiance to the king, and went to war with him, the **former's vassals** would be **bound to follow him** to battle and would fight against the king **without any theory or penalty of treason** in their view.

It is obvious therefore that the **result** of this system was to establish in France a number of **isolated powerful barons**, who in theory were bound to the central authority by the ties of homage and allegiance, who owed suit and service to the king and were under his protection ; but who were **practically independent** of, in many cases might be more powerful than, and were often in open war against him. **France** was a **confederacy** bound by **slight ties** to a nominal head, who was after all but the equal, or perhaps the inferior in actual power, of many of its members.

E.g. In later times, **Henry II.** of England as Duke of Aquitaine

was theoretically the inferior and man of Philip of France; while actually he owned more territory in France than his lord, and was frequently engaged in successful warfare with that lord.

The **central power** was therefore reduced to a mere **shadow**, and its influence and authority over the rest of the kingdom depended entirely on the **character of the king**, who, if he were strong and high-spirited, might attain considerable importance by making the best use of his own position and the jealousies of the feudatories, or, if he were weak and cowardly, would be the puppet of the stronger and bolder spirits.

This was the state of affairs in France; and it was this **kind of feudalism which the Norman host intended or hoped to establish in England:**

E.g. They intended to carve out for themselves **large lordships** for which they would do homage and fealty to William. Then retiring to their provinces, and conceding to him a nominal supremacy, they would become **practically** powerful **independent princes**, ruling their lands with unquestioned and unlimited sway, much as William had ruled Normandy, or the dukes of Aquitaine ruled their patrimony.

William, however, was **determined not to sink into a feudal roi fainéant** of the type of the later Carolingians and early Capets. He was determined to be **King of all England**, that is, lord of the lowest as well as the highest, and not merely the nominal head of a number of practically independent feudatories. It was with **this object** therefore that he formed his policy, and it was in consequence of this that the **attitude of the Norman kings was distinctly hostile towards feudalism.**

II. POLICY.

William's measures of repression and subjection directed against his turbulent followers ran on FIVE distinct lines.

I. Claim to the Crown.

He declined entirely to succeed to the Crown of England by the right of conquest as his followers wished and urged him to. On the contrary, he **claimed to succeed as the heir of Edward the Confessor**, who, he alleged, had **appointed** him as the most fitting successor both in his lifetime and **by will.** Disregarding Harold, whom he treated as an usurper, he presented himself to the

trembling Witan in right of this recommendation and claimed to be elected. The principle, or rather **elaborate fiction**, by which he claimed election being that as there was no fully qualified member of the royal house to succeed, the reigning monarch possessed the power of appointing a suitable person for the choice of the Witan. It is needless to add that **no such power** had ever been recognised as residing in the monarch; that in early times the fullest right of election had belonged to the Witan; that the later theory of Anglo-Saxon succession limited this **full right** only by confining the choice among the members of the royal family; and that in consequence, if the royal family failed, the right returned in all its original extent; and that that right had been exercised in the case of Harold.

William, however, claimed to **succeed** as the **heir of Edward.** The Witan bowed before the sword of the Conqueror, and the forms of election were gone through.

The **importance** of this elaborate fiction was **incalculable** to England:—

William succeeded as rightful King of England kept out of his rights by the traitor Harold.

Therefore he succeeded to **all the rights and duties of the Saxon kings.**

Therefore, though all who resisted or had resisted him were **rebels** and liable to forfeiture, yet **those who had not fought against him** and who acknowledged him as king were peaceful and law-abiding subjects whom it was his duty to **protect.**

Therefore, though the lands of all rebels would be confiscated and used to reward his followers, yet there would be **no general confiscation and redistribution of the land.**

Therefore the Normans would succeed to all the rights and duties of their Saxon predecessors (modified, of course, enormously by Norman custom) and the **relations between the king and the realm would be unchanged.**

Therefore, finally, though feudalism and the feudal tenure (the only one the Normans could understand) would of necessity be introduced, it would **not** be the **disintegrating feudalism of France,** but the feudalism of later Saxon times, under which the king was not merely the supreme landlord but, also the lord of the whole race, and under which **every man was bound to the king,** as against even his own lord, by the paramount duty of attending **the fyrd,** the militia for national defence, with the penalty of treason before his eyes in the event of neglecting to obey the summons.

II. Division of the Lands.

It was **necessary** for William to **reward** his followers, who had assisted him solely with the prospect of booty, with **large grants** of the lands which had been **confiscated** after Hastings, and which were in a short time **largely increased** owing to the forfeitures which followed the various unsuccessful revolts, stirred up in all parts as soon as the Saxons had recovered from their panic, and as soon as their selfish leaders perceived the reality of the danger which they had brought on themselves by their jealousy of Harold.

It was **impossible**, and indeed it would have been **dangerous, not to make large grants** of land to his principal followers; and yet it was almost as dangerous to grant out large provinces to them which might enable them to establish themselves as powerful independent feudatories and override even the obligation of the fyrd.

William therefore devised an **intermediate course. Great estates** were given to all the principal barons but, with a few exceptions (which had their origin in special circumstances), they were **scattered through various counties,** so that there was no coherence or union between them, and there was no danger that an independent princedom might be consolidated out of them. Moreover, 'an[1] insubordinate baron whose strength lay in twelve different counties would have to rouse the suspicions and perhaps defy the arms of **twelve powerful sheriffs** (supported by the fyrd, the army of the shire) before he could draw his forces to a head. In his manorial courts, scattered and unconnected, he could set up no central tribunal, nor even force a new custom upon his tenants, nor could he attempt oppression on any extensive scale.' By this measure, therefore, the welfare of the people was secured and the **central power guarded from the disintegrating effects of feudalism.**

E.g. **Odo of Bayeux,** William's half-brother, received altogether 439 manors; but they were scattered through 17 counties.

Robert of Mortain received 793 manors, scattered through 20 counties.

Eustace of Boulogne had fiefs in 12 counties.

Hugh of Avranches in 21, besides his palatine earldom.

Of the 41 great vassals enumerated in Domesday, all have estates in more than 6 counties.

To complete the effects of this process, 'very shortly after his

[1] Stubbs, *Const. Hist.* i. 273.

coronation he appears to have allowed a **general redemption of property.** Proprietors submitted, paid a sum of money and received back their lands as fresh grants from the Conqueror. In addition to this, many of the **smaller thegns** and **free ceorls** were too **insignificant** to be touched, and in many instances some fragment of their dead husband's property was given to the **widows** saddled frequently by some ignoble tenure. The result of this was that, even after the last Saxon revolt had been crushed out and the last Saxon forfeitures had been enforced, there remained a **leaven of Saxon landowners** imbued with the old Saxon theories of royalty, and forming **a useful counterpoise** to the turbulence and ambition of the Conquest nobles.

III. Government by Sheriffs.

1. **The Sheriffs** : It was obviously wholly contrary to William's interest to commit the government of the country to the large landed proprietors of the Conquest, and thereby create most probably the great hereditary jurisdictions of the continent which he was so anxious to avoid. He did not therefore establish a system of great earldoms, entrusting the management of the county or counties to a great hereditary baron. But he continued the Saxon system of **government by sheriffs** ; who were royal officers entirely, who were intended to curb the barons by means of the army of the shire, and who were at first not hereditary officials but merely appointed for life.

2. **The Palatinates** : It is evident, however, that though interest would dictate some such form of government as a rule from the first ; yet 'the[1] absolute **necessity** of measures by which the disruptive tendency should be defeated only forced itself upon him **by degrees.**'

At first, in fact, there are a small number of EXCEPTIONS to the general rule which show that its full importance was not yet entirely realised.

These were the **earldoms,** palatine or otherwise, created at the Conquest. In every case there was some reason to account for such an exception, and the cases themselves were extremely rare.

E.g. '**William Fitz-Osbern**[2] succeeds to the earldom of Herefordshire, which had been held by the Confessor's nephew Ralph.

'**Ralph Guader** has the earldom of East-Anglia ; and **Edwine**

[1] Stubbs, *Const. Hist.* i. 270.

[2] *Ibid.* i. 360.

and **Waltheof** retain until their fall some portion of the territory which they inherited with the same title.

'The three great earldoms of **Chester, Shropshire,** and **Northumberland** were created by the Conqueror out of the **forfeited** inheritance of **Edwine, Morcar,** and **Waltheof,** and may be regarded as continuing the line of the ancient magistracies.

'**Hugh of Avranches** earl of Chester, **Roger of Montgomery** earl of Shropshire, and **Alberic earl of Northumberland** are the only persons who in Domesday hold the title of comes (earl) by virtue of English earldoms; all the rest —William of Evreux, Robert of Eu, Robert of Mortain, Eustace of Boulogne, Alan of Brittany, and Robert of Meulan—were **counts** simply, the first three of Norman, the latter three of French counties.

'In some other cases the jurisdiction of the ealdorman was held by a **bishop** who may have borne the title of earl, though the evidence on this point is not convincing: such was the position of **Odo of Bayeux** in Kent, of **Walcher of Durham,** and perhaps of **Gosfrid of Coutances,** the founder of the fortunes of the Mowbrays, in Northumberland.'

His first earls, therefore, William Fitz-Osbern and Ralph Guader, were merely the **successors of the Saxons**; and no doubt some of the few Norman earldoms were created in this way **before the need of watchfulness was impressed on the king** by the plots and revolts of the Normans.

The great majority, however, were owing to the **necessity of national defence** on the marches. For this purpose William established the **great palatine earldoms** 'in[1] which the earls were endowed with the superiority of whole counties, so that all the landowners held feudally of them, in which they received the whole profits of the courts and exercised all the regalia or royal rights, nominated the sheriffs, held their councils, and acted as independent princes **except** in the owing of homage and fealty to the king.'

E.g. The earldom of **Chester.** The earl held as freely by his sword as the king held England by his crown. He was lord of all the land; he had a regular court of feudal barons; and the writs ran in his name.

The earldom of **Shropshire,** which appears to have possessed all the rights of a palatinate, though not usually reckoned as one.

[1] Stubbs, *Const. Hist.* i. 371.

These two were intended to guard the **Welsh** marches and extend their territories at the expense of the Welsh.

The palatinate of **Durham**, which was founded on the immunities granted by the Northumbrian kings, and was intended to act as a barrier against the **Scots.** The palatine earldom of **Kent**, which was intended to protect the frontier exposed to attack from **Picardy.**

3. **The Conquest Families** : The **wisdom** of William's **policy of separation** and centralisation is fully shown by the **history** of the **earldoms** of the Conquest, which nearly all served almost immediately as **centres of revolt**, and by the history of the families who owned them, who for centuries supplied the chief opponents of William and his successors, and leaders in all the civil wars. The **conspiracy of the earls in 1074 showed the danger** ; and from this time William created no more great jurisdictions, but made use of every opening afforded by the treason of their holders to **gather in the powers he had thus resigned.**

E.g. **Roger the son of William Fitz-Osbern** was deprived of his earldom after the conspiracy of **1074.**

Ralph of Guader was similarly deprived at the same time. The daughter of Ralph, who had married the daughter of Roger Fitz-Osbern, was the mother of **Robert Beaumont III., Earl of Leicester**, who was the soul of the great revolt against Henry II. in **1174.**

In **1083**, **Odo of Bayeux** by his oppression and ambition forfeited the confidence of William, and was arrested and imprisoned.

THESE THREE EARLDOMS WERE RETAINED BY WILLIAM, who did not re-appoint to them. Odo recovered his earldom on William's death, but almost immediately finally lost it for his adherence to Robert.

E.g. **Roger Montgomery**, of Shropshire, was concerned in the rebellion of Robert in **1076**. His son, **Robert de Belesme**, supported the latter against William Rufus in **1078**. Finally, the treason of Robert de Belesme to Henry I. caused the extinction of the earldom of Shropshire.

E.g. The first **Earls of Chester, Hugh and Richard**, remained unswervingly faithful to the Crown. But the dangerous importance of their position is shown by the anarchy of Stephen's reign, during which **Ranulf** of Chester fought definitely on no side, but rather fought 'for his own hand,' made war and treated with both parties, like an independent prince. **Hugh**, his successor, was one of the

leaders of the rebellion of 1174. But the last of the family, **Ranulf**, steadily supported John and Hubert de Burgh. On his death Chester was appropriated as a provision for the king's eldest son.

The palatinate of **Durham** supplied the powerful bishop **Hugh de Puiset** as one of the chiefs in the revolt of **1174**. Like the earldom of Chester, it **retained many** of its **chief characteristics** till the present day. Its separate **jurisdiction**, in fact, was not transferred to the Crown till **1836** by Act of Parliament, 6 Will. IV., c. 19.

E.g. The earldom of **Northumberland**, given by William Rufus to **Robert Mowbray**, the nephew and heir of **Gosfrid of Coutances**, was almost immediately forfeited for his adhesion to Robert. But the Mowbrays, in spite of this, founded a powerful baronial family in the north, which appears again and again in the civil wars on the side opposed to the king. Among these Mowbrays may be mentioned **William**, who was one of the guardians of the Charter, and one of those barons who clung to Louis in preference to Henry III.; **John**, one of the partisans of Thomas of Lancaster, who was hanged by Edward II. at York in 1322; **Thomas, earl of Nottingham**, one of the Lords Ordainers; **Thomas, earl Marshal**, who was beheaded in 1405 for his share in Scrope's rebellion; and, lastly, the **Yorkist duke of Norfolk, John**, who was slain at the second battle of St. Albans, 1461.

4. **Beneficial Results**: But though these **exceptions** to William's policy were **disastrous** to his **attempt** to establish an absolute monarchy, they were in the long run **highly beneficial to the liberties of the nation.**

He **designed** to be **supreme king**, limited neither by the constitutional obligations of the Anglo-Saxon monarchs nor by the privileges of a feudal baronage.

The power and turbulence of the Conquest nobles **compelled** his sons to renounce to some extent this lofty position, and to **seek in the support** of the **Saxons**, and in promises of good and constitutional government, a defence for their thrones, endangered by Norman treachery and revolt.

5. **Sheriffdoms**: But while guarding against the hereditary jurisdictions of the Continent, he failed to foresee the danger which lay in the perpetuation of HEREDITARY SHERIFFDOMS. On the principle of the hereditary Norman viscounties, the sheriffdoms tended to become hereditary, 'and[1] with the **worst consequences,**

[1] Stubbs, *Const. Hist.* i. 272.

for the English counties were much larger than the Norman bailiwicks, and the authority of the sheriff, when he was relieved from the company of the ealdorman, and was soon to lose that of the bishop, would have no check except the direct control of the king. If William perceived this, it was too late to prevent it entirely; some of the sheriffdoms became hereditary, and continued to be so long after the abuse had become constitutionally dangerous.' **The history of the sheriffs, therefore, is a record of the attempts made by various kings to limit their powers.**

E.g. **Henry I.** removed the feudal barons from the sheriffdoms and substituted for them his **officers of the Exchequer**, new men, bound to him by ties of interest and gratitude, and thrown naturally into opposition to the feudal barons.

Under **Stephen**, however, who gave away to his followers all that he could, the **barons recovered** the **sheriffdoms**.

It was reserved for **Henry II.** to begin the struggle again by the judicial regulations of the Assizes of Clarendon and Northampton.

(v. NATIONAL COUNCIL, REPRESENTATION, **Itinerant Justices and Sheriffs, p. 46.**)

iv. The Oath at Salisbury.

The **seal** was set to this feudal system established by William, at **Salisbury** in **1086**, immediately after the Domesday survey had been completed. 'Thither came all his witan and all the landholders of substance in England whose vassals soever they were, and they all submitted to him and became his men and swore oaths of allegiance to him that they would be FAITHFUL TO HIM AGAINST ALL OTHERS.'

The **object** of this was that now the feudal tenure of land was fairly consolidated, a direct tie was provided between the king and all freeholders '**which**[1] **no inferior relation existing between them and the mesne lords would justify them in breaking.**'

This was the most **heavy blow** dealt at the disruptive tendency of **feudalism**. It destroyed the great feature of the French system, that a vassal was bound to follow his lord even to war against the king, for such a proceeding would now constitute and be punished as TREASON.

v. Amalgamation.

William's general policy may be described as the **amalgamation of the best in both systems**, English and Norman. This

[1] Stubbs, *Const. Hist.* i. 267.

was at once strictly in accordance with his double character as the heir of Edward and the duke of the Normans; and was at the same time calculated to aid his policy of repression towards feudalism by using the Saxons as a counterpoise. Thus—

1. **Revenue.** He retained the **royal estates**; reimposed and doubled the **Danegeld**; introduced the Norman **feudal dues.**

2. **Army.** He retained the **fyrd**; introduced **knight service**; and made use of **mercenaries.**

3. **Judicature.** He retained the **local courts** and the local machinery; but he **removed the bishop** from the shire court, and brought it into more direct **connexion** with the **central power** by introducing the Norman barons, and by placing a Norman justiciar at the head of the judicial system. He also introduced the **ordeal by battle.** He retained, and greatly developed, the police responsibility of collective **frank pledge.** He introduced **recognition** by sworn inquest.

4. **Witan.** The **Witan** retained very much of its old constitution and functions, but its rights were greatly limited by the power of the king and the carelessness of the nobles.

It is evident, therefore, that in the **higher branches** of the administrative, and institutionally, **Norman** machinery and institutions **took the place** of Saxon as a rule;

And that the **lower branches** for the most part **remained unchanged**, though modified and invigorated by contact and consolidation with the new Norman ideas.

And this was **natural**; for the higher parts of the system would be those which would have most prominence, and those with which the Normans would have most to do; and in these the Norman system was immeasurably **stronger** than the Saxon. The lower branches and the local liberties, would affect more the Saxons, and their real importance would not be thoroughly perceived, or would be viewed solely as calculated to form a barrier against the influence of feudalism, while at the same time the **Norman system was extremely weak in**, if not entirely destitute of, lower institutions, and thus it was impossible wholly to supersede the Saxon local system.

III. THE REAL CHANGE.

The **real change** effected by the Norman Conquest falls under FOUR heads:—

I. **The introduction of the feudal tenure of land** (v. Anglo-

Norman Feudalism) which was gradual and at first hardly realised by the Saxons, who found themselves bound by new ties before they knew that they held their lands on a new tenure, and was produced by usage and the introduction of new men and new ideas, not by any direct legislation.

II. **The separation of Church and State**, which was effected by the enactment 'that the bishops and archdeacons are no longer to hold pleas in the hundred court, but to **have courts of their own**; to try causes by canonical, not by customary law, and to allow no spiritual cases to come before laymen as judges. In case of contumacy, the offender may be excommunicated, and the king and sheriff will enforce the punishment. In the same way laymen are forbidden to interfere in spiritual cases.'

The result of this measure was to **separate** the **Church** off **from the State** and render it an independent corporation outside the Common Law. Under **William's** vigorous rule and **Lanfranc's** conciliatory influence the **Church** was merely an **estate of the realm**, independent, it is true, of the law, but wholly subject to the king's will. Under the weaker hands of his successors the **Hildebrandine** theory of Church government **triumphed** to a great extent over the temporal power.

III. **The Forest Laws.** The **forests** originally were probably the unenclosed woodlands which had been part of the folcland and became royal demesne under the feudalising tendencies of the later Saxon period.

The first forest law is that of **Cnut.**

1. 'I will that every man be worthy of his hunting in wood and field on his own estate. And let every man abstain from his hunting: look, wherever I will that it should be freed, under full penalty.'

2. **William the Conqueror** enclosed and greatly enlarged these ancient woodlands as hunting grounds. More than sixty churches were levelled in order to make the great **New Forest.** The forest laws, a code of great barbarity, were established for their regulation. Poaching was punished by blinding, and all strange dogs were caught and mutilated in the foot. The cruelty of the forest laws, however, was mainly due to **Henry I.**, who added regulations of the most bloody ferocity.

3. **William Rufus** and **Henry I.** both agreed to surrender the

forests on their accession as the price of help from the English against the Normans. But as soon as they found themselves safe, forgot or repudiated the promise. Henry, moreover, added largely to the forests.

4. **Stephen** similarly promised to surrender the forests of Henry, retaining those of the two Williams, but this promise does not seem to have been kept.

5. **Dialogus de Scaccario, I. ii.** 'The forest law which regulates the punishment (pecuniary or corporal) or acquittal of offenders against it, is **outside the common law** and depends solely on the absolute will of the king or of his deputy specially appointed.'

The forests were not visited by the ordinary judges, but by a **special commission** of officers specially appointed. They had **courts of their own**, independent of the shire-courts, and **all** who were **bound** to **attend the shire-court** were **bound** to attend the **forest-courts.** They were presided over by a **master-forester who was independent even of the great justiciar.**

6. **Henry II.** issued the first forest code. The **Assize of Woodstock, 1184.**

C. 1. '**Transgressions** against the forest laws shall be **punished** as in the days of Henry I.

C. 2. '**No one** shall have bows, arrows, dogs or harriers in his forests **without** the king's license.

C. 3. '**Waste** of vert or venison is strictly forbidden.

C. 8. 'If the woods are **illegally destroyed**, the king's forester in charge must answer for it with his life.

C. 9. '**Clerks** are forbidden to hunt, and if they do so are to be immediately arrested.

C. 11. '**All who are bound to attend the shire court shall attend the forest court** to be ready to answer for any offences against the **forest law.** In the event of not doing so they shall be at the king's mercy.

C. 12. 'After the first and second offence sure pledges of good conduct shall be required. But the **third offence the offender shall answer for with his life.**

C. 13. 'All above **12 years** old who reside within the forests, including clerks who hold lay fiefs, shall take the **oath** to the forest peace.

C. 14. 'Wherever the king's beasts of the chase roam, **mastiffs are to be mutilated** in the claw to prevent them hunting.

C. 16. '**Night hunting** in the forests is forbidden under penalty of a fine and imprisonment for a year. No interference shall be offered to the beasts in the king's or his ancestors' forests under the same penalty.'

The punishments under this code are **milder** than those usual under Henry I.; but the law was **enforced** with even **greater rigour.** The constant interference and irresponsible position of the officers, and the **inconvenience** of the regulation requiring all to attend the forest courts caused the forest administration to be regarded with great **hatred.**

7. In spite of this, **Richard and John** established some new forests, and these were the **most offensive afforestations** of all, for the ideas and rights of property had become more definitely established, and the rising spirit of liberty revolted against any extension of this separate and cruel jurisdiction.

8. The kings seem to have clung to the forests not only for the mere pleasure of hunting, but also because this jurisdiction being the mere emanation of their will, they **appeared in a more exalted position to their subjects** than when bound and limited by the constitutional restrictions of the common law. It is not strange, therefore, that the **party of liberty** were anxious to **limit** these excessive powers within the bounds of law as much as possible.

E.g. **Magna Carta.**—C. 44. '**No one** is to be compelled to **attend** the **forest courts** unless he lives in a forest or is concerned in a suit,' thus **repealing** C. 11 of the Assize of Woodstock.

C. 47. 'All forests afforested in **John's** reign are to be **disafforested**; all rivers placed in fence are to be thrown open.

C. 48. 'All **abuses** with regard to the forests are to be inquired into by a jury of **12 legal men** elected in the county court, and abolished forthwith.'

These clauses, however, were **omitted** with the constitutional clauses in the charters at first issued in Henry III.'s name. This omission was rectified in 1117 by the issue of the **Forest Charter of Henry III.**

C. 1. 'All **forests created since Henry II.** are to be disafforested.

C. 2. '**Men living without the forests shall not be required to attend the forest courts unless they are concerned in a suit or are sureties for any offender.**

C. 3. 'The forests of **Richard and John** are to be **disafforested.**

C. 4. 'Private owners of vert in the forests shall possess it as **at the accession of Henry II.**

C. 5. 'The **visitation** of the forests shall be conducted as it was at the **accession of Henry II.**

C. 6. 'An **inquiry** shall be held every three years by the testimony of legal men for the **mutilation** of mastiffs kept in the forests; but only in places where this was done at the **accession of Henry II.**

C. 10. '**A heavy fine, imprisonment, or exile, is substituted for the old penalty of mutilation or death for poaching.**

C. 12, 13. 'Every free man may have in his forests or on his land in the king's forests, a mill, fishpond, marl pit, &c., and may keep hawks, sparrowhawks, &c.

C. 15. '**Outlaws** on account of the forest laws from Henry II. to Henry III. can make their peace and find security for good conduct.

C. 16. 'The regular verderers and the master alone shall have jurisdiction with regard to offences again vert and venison.'

By this Charter, therefore, the MOST OFFENSIVE CLAUSES OF THE ASSIZE OF WOODSTOCK ARE REPEALED, and the abuses which have sprung up since the accession of Henry II. are remedied.

9. These laws, however, were not well kept, for in 1258 the barons complained in the **Provisions of Oxford** that illegal forests existed, and demanded that they should be disafforested.

10. The forest rights, however, were too **valuable** to be wholly given up; and though the severity of the law was **mitigated,** and though the policy of granting out the rights of enclosing a **chase** or park to the nobles tended to di-

minish the opposition of the nobles, yet the anomalous law remained hateful to the great body of the people, and the arbitrary extension of the forests during the period of his arbitrary government without a parliament 'assisted[1] in placing our **first Charles** on the scaffold.'

IV. **The general modification and development of the national character.** 'The[2] change of administrators brought with it necessarily a **change of custom.** Normans replaced Saxons, and it was inevitable that **Norman ideas** should replace Saxon theories. The amalgamation of titles produced an importation of **new principles** and possibly of **new functions**, for the Norman count and viscount had not exactly the same customs as the earls and sheriffs.'

New names and **new forms** were introduced everywhere, and a great **change** in legal and constitutional **phraseology** and **facts** necessarily followed. The changes which take place in the state have their resulting analogies in every village.

Moreover, the Norman Conquest dragged England 'into[3] the **general network** of the **spiritual** and **temporal politics** of the world, rousing her thereby to a consciousness of unsuspected undeveloped powers; it gave a new direction to her energies, it widened and consolidated her sympathies; it trained her gradually to **loyalty** and **patriotism**; and in the process of time it IMPARTED SO MUCH and CAST AWAY SO MUCH' that when the conquerors and conquered united as one nation, they formed something **different** to what either the Normans or the Saxons had been, though there were STRONG RESEMBLANCES to both.

CHAPTER IV.

NATIONAL COUNCIL.

I. ANGLO-SAXON.

1. Under the **heptarchic** divisions there was **no unity** but that of the Church. The only national councils were the ecclesiastical. **Each** kingdom had its **own Witan**, and the deliberations of the kings were assemblies of ambassadors merely. It was only when

[1] Palgrave, *Norm. Conq.* [2] Stubbs, *Const. Hist.* i. 269.
[3] Stubbs, *Const. Hist.* i. 216.

Wessex annexed the **rest** of **England** that a true NATIONAL COUNCIL exists. It was therefore a consequence of royalty, and differs from the councils of the smaller kingdoms in not including the people. The **kingly theory** has **increased** with its power, and has depressed the ancient democratic institutions.

2. The MEMBERS are the royal family, the bishops, the chief men of the kingdom, and the king's thegns; the qualification being wisdom solely.

3. Its RIGHTS:

a. Legislation, taxation, grant and transfer of folcland, determination of war and peace, required its counsel and consent. It was a court of final appeal and first instance.

β. It had the right of **electing** the king: but its choice was limited to the **best qualified person** in close relationship to the last sovereign. The case of **Harold II.** is exceptional, there being no member of the royal family duly qualified.

γ. It seems to have had the right of **deposition**: the two best instances are **Alcred of Northumbria** and **Sigebert of Wessex**, both of whom are recorded to have been regularly deposed by their Witan. The case of **Ethelred** was in too revolutionary times to be of much value.

Though in **theory** the **rights** of the Witan were **enormous**, yet they **practically** availed little against the royal will, for the king could always command a majority by **packing** the house with king's thegns.

II. ANGLO-NORMAN.

1. TENURE BY BARONY now became the **qualification** for membership, though the **bishops** still sat in right of **wisdom** and the king had the power of summoning **learned lawyers**, or **foreigners**, who were not barons. It assembled three times a year when the king personally dispensed justice.

2. Its MEMBERS were theoretically all the landowners, but practically the archbishops, bishops, abbots, earls, barons, knights, who were all in reality tenants in barony.

3. Its RIGHTS were legally the **same** as those of the **Witan**, but practically were **limited** by the **king's power.**

a. Its **legislative** and **taxative** authority was probably merely **formal.**

β. Its **judicial** functions are well attested :

E.g. Earls **Waltheof** and **Roger** condemned, 1076. **Bishop of Durham** tried 1088. **William of Eu** condemned at Salisbury, 1096. **Robert de Belesme** accused of treason by Henry I., 1102.

Also in **civil** business :

E.g. A suit between the **churches** of **York** and **Worcester** decided by council at Pedreda under William I. Quarrel between **bishops** of **Llandaff** and **St. David's** similarly arranged under Henry I. **Proceedings** of **Stephen** against the **bishops** in the most formal way in the national assembly.

γ. **Nominations** and **elections** of bishops were conducted in it till Henry I. surrendered the former right, when the latter was still conducted in the national council.

δ. Right of **electing** the king was also retained :

E.g. The elections of William II., Henry I., Stephen, Maud. The acceptance of Henry II. and rejection of Stephen's heir.

4. In many instances when the king holds his court at Westminster, the **archbishop celebrates his council** in the same city ; this custom formed a precedent for the coincident summoning of **Parliament** and **Convocation** later : it was thus easy to get the consent of both Church and State to ecclesiastical matters, while the frequent **union** of **legislative** and **archiepiscopal** powers added also the papal authority and consent :

E.g. **Henry I.'s** ratification of the **canons of 1127** in a church council, presided over by the archiepiscopal legate.

III. HENRY II.

1. Its COMPOSITION now became that of a perfect feudal court, in which the sole qualification was tenure by barony ; for the **Constitutions of Clarendon** had swept away all traces of the old qualification of wisdom by declaring that the **bishops sat in right of barony.**

It had three forms :

α. **Ordinary** : the magnates and great officers.

β. **Extraordinary** : all the tenants-in-chief.

E.g. The councils in which Henry decided the quarrel be-

tween Castile and Navarre; issued the Assize of Clarendon; determined on the resumption of lands; discussed the marriage of his daughter.

γ. **Theoretic**: all the landowners.

E.g. When the whole nation assembled in arms in 1086 and 1116. Or when the military levies were called out in 1155 for the siege of Bridgnorth, or for the expedition to Normandy in 1177. Or when the **shire-courts** were **consulted** on taxation.

Later, when the representative theory was in full play, this **third form became the regular constitution** of the council.

Its **members** were therefore the **same** as in the **Norman** period, though greater prominence is given to the minor tenants-in-chief.

2. WRITS OF SUMMONS originated in the proceedings of the **Exchequer**. The king's debtors were summoned to the sessions by a **special** summons. A **general** summons was issued to call the shire-courts together to meet the justices.

Similarly those **barons** who dealt **directly** with the king in military, fiscal, and legal matters were summoned **specially** to the national council. Those **tenants-in-chief** who acted through the **sheriff** received through him a **general** summons.

Henry II. made use of these writs of summons to limit the numbers of the council.

The **earliest record** of the **existence** of these two modes of **summons** is the account of the **insult** offered to **Becket** at Northampton, 1164, by sending him a general summons to the council instead of the special one to which he was entitled.

3. Its BUSINESS was much as before, but its formal consent was becoming more **real.**

α. In every **public** matter the nation was consulted:

E.g. Peace and war; alliances; royal marriages; arbitration between foreign powers; &c.

β. **Legislation** was generally issued by the advice and consent of the council. The **Assizes** of the reign, by which so many important innovations were effected, are all, except the Assize of Arms, issued formally **per consilium et assensum archiepiscoporum, episcoporum et baronum, comitum et nobilium Angliæ.**

γ. **Taxation.** There is **no formal grant or discussion** till the end of the reign of **Richard.** Therefore the tax was probably imposed by the king with the formal consent of the council, though

individuals might **object** to it and refuse to allow its collection on their lands :

E.g. **Archbishop Theobald's** denunciation of the scutage of 1150. **S. Thomas's** refusal to agree to Henry's manipulation of the Danegeld, 1163. **S. Hugh of Lincoln's** refusal to furnish money for Richard's French war, grounded on the immunities of his church, 1194. **Archbishop Geoffrey's** refusal to allow the carucage to be collected on his estate 1201, 1207.

δ. **Judicial.** The king sat in person to determine the complaints of his people with the advice of his judges, bishops, and council.

IV. MAGNA CARTA.

1. CONSTITUTION. Archbishops, bishops, abbots, earls, greater barons to be summoned by a **special** writ ;

Minor tenants-in-chief to be summoned by a **general** writ addressed to them through the sheriff ;

Forty days' notice will be given in the writ ;

The **cause** of summons and **place** of assembly shall be stated in the writ ;

On the day of meeting the **consent of those present shall bind the absent.** **M.C. 14.**

As regards the constitution of the council, Magna Carta merely recognises the established system and the theory of summons. It is obvious that this clause was drawn by **barons** who did **not perceive** the **change** which was approaching and which had already given a **sign** that it was about to make itself felt.

In 1213 a **regular representative council** met at **S. Albans** ; and in the same year the king summoned four discreet knights from each shire to discuss the national business at **Oxford.**

It is therefore obvious that **in the constitution of the national council Magna Carta was behind its time.**

2. RIGHTS. *a.* **No aid or scutage** shall be imposed on the kingdom without the common assent of the realm ; saving always the **three customary aids** : for the king's **ransom** ; for **marrying** his eldest daughter ; for making his eldest son a **knight** ; and these three shall be exacted at a **reasonable** rate. **M.C. 12.**

The theory, however, that a vote of the national council bound the realm, paled before the growing representative principle, and it was usual to **supplement** the consent of the council by the con-

sent of the shire-courts. **Individual consent in taxation was not yet rendered unnecessary.**

β. The national council in **other matters** was taking a more real share, and this reality was increased during the minority of Henry III.

V. REPRESENTATION.

In order to turn the feudal court of peers, constituted by Magna Carta, into a **concentration** of **local machinery** and an **assembly** of **estates**, the representation of all classes of the people was necessary.

I. **Representation** is intimately bound up in Teutonic politics; for HUCBALD writing in the middle of the 10th century of the Saxons in the 8th, says that their constitution was as follows:—

1. A **local** arrangement into **pagi** presided over by principes.
2. **Three orders**: Edlingi, Frilingi, Lassi.
3. Once a year **12 men were elected from each order in each pagus**, who assembled in Mid-Saxony at Marklo, near the Weser, and held a common council for national business.

II. **Anglo-Saxon.** 1. THE TITHING. The capital pledge had the duty of representing his tithing in the local courts.

2. THE LOCAL COURTS.

α. **The shiremoot** was a **model parliament.** For it was attended by the **representatives** of **all classes**, by the archbishops, bishops, abbots, earls, thegns, the representatives, or **12 legal men** of the hundred; and the representatives, or **reeve and 4 men** of each borough. The attendance of the representatives of the hundreds and boroughs proves it to be a **concentration of local machinery**, while the presence of representatives of all classes makes it an **assembly of estates.**

The Witan, on the other hand, stopped short at the thegns, omitting the representatives of the boroughs and shires. It is, therefore, the type of the House of Lords, as the shiremoot is of the two Houses of Lords and Commons.

The history of Parliament, therefore, in early times, is the **substitution** in the national council of the constitution of the shiremoot for the constitution of the Witan.

β. **The hundred court** was attended by the lords of lands

within the hundred, or their stewards representing them, and by the parish priest, reeve and 4 men of each township. This court was, therefore, on a smaller scale, a **concentration of local machinery and an assembly of estates.**

3. THE EXECUTIVE COMMITTEES of shire and hundred.

The **laws of Ethelred** prescribed 'let pleas be held in each wapentake, and let the **12 senior thegns** go out and the reeve with them, and swear on the halidome which shall be put into their hands, that they will accuse no innocent man and conceal no guilty one.'

There was also a similar representative committee for the shire court.

These committees contained the **germ of the juries** of the shire and hundred.

III. **Juries. Anglo-Norman.**—The Normans introduced into England an **innovation** derived directly from the Frank capitularies. This was **recognition by sworn inquest** first used in England under William I., for the 12 senior thegns of Ethelred are not a complete jury.

It was **first** employed in England when William ordered that **12 knights** should be elected in each county court, from whose sworn depositions the **ancient customs** of the country should be drawn up.

Domesday Survey. The lords of lands, the 12 legal men of the hundred, the reeve, priest, and 4 legal men of the township are sworn to declare the truth, and are thus constituted a **jury of recognition**, from whose sworn deposition of fact the great land register is drawn up.

Fiscal recognitions are conducted in this way under **William Rufus** and **Henry I.**

1106. Henry I. commissions 5 barons to ascertain the customs of the Church of York by the **oath of 12 men.**

IV. **Juries. Henry II.**—'HENRY II.[1] first thoroughly organised the jury system and applied it to **every description of business**, legal and financial. He expanded and consolidated it so much that he was not unnaturally regarded as the **founder** of it in its English character. It became a resource open to every suitor.' To some it seemed an expedient of tyranny; to the lawyers of the time a boon conferred by royal benevolence on the people.

1. LEGAL. A. **Civil matters.** The ordinance of the GRAND

[1] Stubbs, *Const. Hist.* i. 614.

ASSIZE allowed the person whose **possession of land** was impugned, to make choice of the old practice of trial by battle and the examination of his right by a jury of **12 sworn witnesses** selected from people of the vicinity by 4 sworn knights, summoned for that purpose by the sheriff acting under royal writ.

The CONSTITUTIONS OF CLARENDON, c. ix.: 'If a quarrel arise between a layman and a clerk, whether any **tenement** is held by **clerical or lay tenure**, the strife shall be terminated by a **recognition of 12 legal men** before the king's justiciar.'

The ASSIZE OF NORTHAMPTON, **c. iv.**: 'And if the lord **deny** to the dead man's **heir seisin** of the dead man's estate when he claims it, the right of the matter shall be tried before the justices by a **recognition of 12 legal men**;' **c. v.** 'The justices also shall make **recognition** of **disseisins** upon the assize.'

From these three were developed the Assizes of **Darrein Presentment**, **Mort d'ancester**, and **Novel Disseisin**, which were merely the **writs** issued by the clerks of the Curia Regis on **petition** of the aggrieved party, which **empowered** the **sheriff** to empanel a **jury** of the vicinity to decide whether the land was held in **clerical or lay** tenure; or whether **seisin** was unjustly refused to the heir; or whether a man had been wrongfully **ousted** from his land.

Out of these recognitions arose the TRIAL BY JURY. The steps are:—

α. At first the jurors are merely **witnesses** of the fact;

β. As business increases, they are under Edward I. **afforced** by the addition of people better acquainted with the matter;

γ. The two are separated. The original **jury tries** the case from the **evidence** supplied by the afforced witnesses.

B. **Criminal matters.** The CONSTITUTIONS OF CLARENDON, c. vi.: '**Accusations** can only be brought against **laymen** by good and true men in the presence of the bishop. If the defendants are such that no one dare accuse them, the bishop shall request the sheriff and the sheriff shall make recognition by the oath of **12 men** of the vicinity before the bishop.'

This is the **germ** of the **grand jury** of presentment in criminal matters. This, however, only affected the spiritual courts

and in particular cases. The grand jury was really a **public prosecutor**, whose duty it was to present at the shire court all of notorious bad reputation.

The ASSIZE OF CLARENDON. C. 1. 'Inquest is to be made through each county and hundred, by **12 men of the hundred and 4 men of the township** by their oath that they will speak the truth whether there be any who are by public repute accounted robbers, murderers, thieves, or companions of such. And the **justices** shall hold the inquiry.

C. 2. 'And if any such be found, they shall be sent to the **ordeal by water**.'

The **Assize of Clarendon** thus established and defined the **grand jury of presentment** in criminal cases, which was to work under the eye of the itinerant justices for the preservation of order. It was reduced to a more definite form and receives a more distinctly representative character in the **Assize of Northampton** and the **Articles of Visitation** issued by Hubert Walter for the direction of the itinerant justices in 1194, and commonly known as the **'iter' of 1194.**

The ASSIZE OF NORTHAMPTON. C. 1. 'If any man is convicted' of various crimes 'by the oath of **12 knights** of the hundred, or if there are no knights present, of **12 free legal men**, and by the oath of **4 men** from each town in the hundred, let him be sent to the **ordeal of water**, and if he fails be mutilated of a foot.'

THE 'ITER' OF 1194. 'First, **4 knights** are to be elected from the whole county court, who shall choose on oath **2 legal knights** of each hundred or wapentake; these 2 shall co-opt on oath **10 knights** from each hundred, or, wapentake, or if knights fail, legal and free men, that the 12 may act as the **grand jury of the hundred** in all matters.

This **jury** was at first judge and witnesses, and gradually by process of **afforcement** underwent the same change as the civil jury.

When the LATERAN COUNCIL of 1215 abolished the ordeal, a **petty jury** of 12 men was employed to try the case again, or **traverse** the verdict of the grand jury, as a substitute for the ordeal.

2. FINANCIAL. The ASSIZE OF ARMS. *E.g.* 'The judges shall make a **recognition** by the **oath** of the **legal knights** or other free and legal men of the hundreds and boroughs, as many as they shall think necessary . . . in order to

find out exactly all in the hundreds, boroughs, neighbourhoods, **who have 16 marks value** of **movables** or rent, and likewise all who have **10 marks**,' in order that their liability being thus declared they may be enjoined to provide themselves with **statutory arms**.

The SALADIN TITHE. C. 2. 'And if any one in the opinion of those present at the collection (*i.e.* a jury of one templar, one hospitaller, an officer and clerk of the king, an officer and clerk of the baron, and a clerk of the bishop) shall give less than he ought, **4 or 6 legal men** shall be elected from the parish who shall declare on oath the **amount** the defaulter ought to have given.'

The CARUCAGE, 1198. **Rog. Hoveden, IV.** 46. 'In that year Richard took from each **carucate five shillings**. For the collection he sent into each county a clerk and a knight, who were to act with the sheriff and legal men elected for the purpose, and sworn to act faithfully. These were to summon the **steward** of each lord, the **lord** or **bailiff** of each town, with the **reeve and four legal men** of the town and **two legal knights** from each hundred,' who are to act as a **jury of assessment**.

3. GENERAL. These instances pave the way for the use of a ury in more general matters :

1213. WRIT OF SUMMONS. 'Let the soldiers of your bailiwick summoned to **Oxford** be with us armed in fifteen days from All Saints' Day. And send **four discreet men** from your country to discuss with us the business of the kingdom.'

This is the **first writ** in which the four discreet men appear as representatives ; the first instance of the **summoning** of the **shire court** to the national council by means of the representative machinery already used in national business. Unfortunately, however, **we do not know if this council ever met**.

1215. INQUIRY INTO EVIL CUSTOMS. 'The king to his sheriffs &c., greeting. Ye know that peace . . . has been concluded between us and our barons, &c. . . . We order that **twelve knights**, elected in the first county court held after you have received these letters, shall **inquire on oath into the evil customs** . . . as stated as the charter.

This letter was issued after the signing of Magna Carta for an inquiry into the abuses to be remedied.

The **principle of representation** is thus thoroughly working in local and national business. While the 'iter' of 1194 and the inquest of 1215, coupled with the election of

coroners presented in the 'iter,' shows that the **principle of election** was also well understood.

It is only necessary to **concentrate** the local machinery by means of elected representatives to change the feudal court of Magna Carta into a **Parliament.**

V. **Itinerant Justices and Sheriffs.** The **link** between the **local courts** and the **Curia Regis,** which tended to **nationalise** and **centralise** the kingdom, while at the same time bringing the local machinery into close **connection** with the central power, was the **circuits of the itinerant justices.**

These **circuits** were **originally** mainly **financial,** conducted by the **Exchequer officers** to substitute a more decided assessment of taxation for the defective Domesday rating.

Under **Henry II.** they assumed a more distinctly **judicial** aspect and were made use of at once for judicial and financial business. Moreover, the powers of the justices were considerably increased. They **replaced** the **sheriffs** as **presidents** of the shire courts; they conducted the recognitions by jury; they were empowered to **override** the **jurisdictions** of the **barons.** Thus they not only became a link between the provinces and the central power, but they also were a **weapon** to be used against the influence of the **sheriff** and the **nobles.**

The **Assize of Clarendon,** the **Assize of Northampton,** and the **'Iter' of 1194** are the chief statutes devoted to the development and improvement of this system.

The ASSIZE OF CLARENDON. C. 1, 2, 5: '**Criminals** are to be presented by the grand jury before the **itinerant justices** and sent at once to the ordeal. **Such criminals cannot be tried in** the local courts or **franchises,** but only before the justices;

C. 4. If the justices are not likely to come soon to the county, the sheriff shall make arrangement for them to be tried in the nearest county court where the justices are;

C. 7. **Gaols** are to be built at the king's expense, where needed, for the reception of these criminals;

C. 8. ALL MEN ARE TO ATTEND THE SITTINGS OF THE JUSTICES, NOR SHALL ANY FRANCHISE EXCUSE them;

C. 9, 11. NO FRANCHISE OR HONOUR (even the honour of Wallingford) SHALL EXCLUDE THE SHERIFF FROM HOLDING VIEW OF FRANKPLEDGE, OR MAKING INQUIRY FOR CRIMINALS;

C. 10, 12. Every **lord** shall be **responsible** for those in his

franchise; and if a presented criminal have not a lord he shall be held guilty;

C. 13. If a man **confesses** his guilt before the legal men, he shall be held **guilty**, though he afterwards deny it;

C. 17, 18, 19. **Sheriffs** are to **help one another** in capturing criminals; are to make lists of fugitives; are to inquire about all strangers and put them to surety;

This statute was carried out by the justiciar and the earl of Essex with the **assistance of the sheriffs.**

1168. Four Exchequer officers acted as justitiæ errantes.

1175. The country was divided into **two circuits.**

1176. The country is divided into **six circuits**, and visited by three judges for each circuit. It was for their instruction that the Assize of Northampton was published.

The ASSIZE OF NORTHAMPTON. C. 1. Murderers, &c., presented by the grand jury are to be brought before the justices and sent to the ordeal. If they fail, they shall lose a foot and abjure the realm. If they do not fail, they may remain on pledge of good conduct, unless the grand jury presented them for murder, when they must abjure the realm;

C. 2. Strangers can only be received for one night;

C. 3. A man who confesses before the grand jury cannot deny his guilt before the justices;

C. 4. The **heirs of a freeman** are to **succeed** him on payment of the **proper relief.** If the heir is a minor, the lord is his **guardian.** The widow to have her dower. The justices are to decide cases of **Mort d'ancester** by recognition;

C. 5. Also cases of **Novel Disseisin**;

C. 6. THE JUSTICES SHALL SEE THAT EVERY MAN DOES ALLEGIANCE PROPERLY TO THE KING;

C. 7, 8, 9, 11. They shall inquire concerning **robbers**; shall destroy **castles** which are to be destroyed; shall inquire into escheats, churches, lands, and female wards of the king;

C. 10. The king's bailiffs are to account to the exchequer for all their exactions;

This statute increases the power of the justices and exhibits the **sheriffs rather in the light of servants than colleagues** in the

shire court to the justices. Moreover, as **no franchise excused non-attendance** at the sittings of the itinerant justices, they presided in the **fullest possible county court**, and thus really formed a **link between the Curia Regis and the provinces**, which was strengthened the more power was taken out of the hands of the sheriffs and entrusted to them, and the more the representative juries were used for national business.

1178. The **18 judges** of the Curia were **reduced** to **5**.

1194. The ITER. C. 21. 'NO SHERIFF is to be an ITINERANT JUSTICE in his OWN COUNTY;'

C. 20. 'Three knights and one clerk are to be elected (as CORONERS) to **relieve** him of **pleas of the crown**;'

C. 1, 23. The justices with the grand jury are to inquire into all kinds of business, legal and financial;

1195. The **oath of the peace** is laid, not on the sheriffs, but on KNIGHTS ASSIGNED in each county (**milites vero ad hoc assignati jurare facient quod pacem domini regis servabunt**);

MAGNA CARTA. C. 24: 'No **sheriff**, constable, coroner, or other of our bailiffs **shall hold pleas of the crown.**'

VI. **Boroughs.**—The growth of the boroughs, the second half of the Commons, was slow. Beginning with the constitution of a **manor** of some bishop, earl, or even the king, by the Conquest they had obtained recognition as individualities apart the counties, and were subject to the king immediately as **demesne**. Of these, however, there were very few in Domesday.

The **reeve and 4 men** (afterwards the **Leet Jury**), was the magistracy, and the voluntary association of the **gnild** would furnish a council consisting of its members.

These towns were liable to **arbitrary taxation** by their lord —**tallages.**

Growth.—1. The **first step** in the direction of **emancipation** was the **purchase of the firma burgi** (or dues to the king or lord) from the sheriff for a fixed sum, which was apportioned by the burghers among themselves. This destroyed a great opening for extortion. It was usually accompanied by a **grant of freedom** from villein services. The burghers, therefore, to whom this grant was given, held their tenement on payment of their share of the **burgage rent.** This is **burgage tenure**, a form of free socage. These burghers (the possessors of the burgage tenements) were the **political constituents** of the borough in early times.

Grant by John to Helleston (burgi firma). 'Know that we have granted . . . to the burghers of Helleston the said town of

Helleston . . . at the ancient ferm and an additional profit of four pounds, . . . to have and hold . . . on the service of paying this ferm in two moieties . . annually.'

Grant by John to Helleston (freedom). 'Know that we have granted that our borough of Helleston shall be a **free borough**, with rights of **toll, etc.**, and rights of **jurisdiction**, except as regards pleas of the crown. Also all the **liberties** and **free customs** which our father Henry granted.'

2. LONDON advanced more quickly than the rest; **William I. confirmed** the old privileges of the citizens. **Henry I.** granted the **ferm of Middlesex**, with the right of appointing the **sheriff**; freed them from the immediate jurisdiction of any tribunal but their own, from the obligation to accept trial by battle, and from tolls. They had **separate franchises** and **weekly courts**. But they are **not** yet a **regular corporation**, but merely an accumulation of distinct corporate bodies.

John confirmed the rights of the Londoners after the struggle, and granted them the rights of a **communa**, or of a corporate body, with the right of electing a **mayor** annually.

London, however, can never have been regarded as royal demesne. The other boroughs got on so **slowly**, that it seems almost as if the kings were jealous of their growth.

3. **Specimens of Charters. Henry II. to Oxford.**—'Know that I have confirmed all your **liberties, privileges, laws**, and **quittances**, which you had in the time of Henry, my grandfather. The **merchant guild** with its liberties and exclusive rights of trade; **freedom from all tolls**, etc., in England and Normandy, by land and sea. All the **liberties** and **privileges** of the **Londoners**. **Exemption** from external jurisdiction, etc.'

John to Niort (grant of a communa). 'We grant a **communa** with its liberties to Niort.'

John to Dunwich (exemption from shire-moot). 'We grant to Dunwich that it be a **free town** with rights of **sac, soc, toll, team**, etc., and freedom from all tolls, dues and Danegeld, saving the privileges of London, on a fixed ferm. It shall be **exempt** from all external jurisdiction but the sessions of the itinerant justices, where it shall be represented by 12 legal men; and if it shall be fined, the fine shall be levied by six good men of the town, and six good men from without.'

John to Hartlepool.—'We grant to the men of Hartlepool that they be **free burghers** and have the **same rights** and **liberties** as the **burghers of Newcastle-on-Tyne** have.'

All these rights and charters were **paid for** heavily, and were liable to **resumption** as a means of fresh extortion.

4. **None** of these charters granted an **exemption** from attendance at the **sessions** of the **itinerant** justices. This necessity of sending their representatives to the shire moot probably formed the **bond of connection between them and the counties in representation.**

5. There is the **solitary** instance of **representatives** of the **boroughs** being summoned in **1213** to **St. Albans**, to discuss the compensation due to the plundered bishops. But they were hardly likely as a rule to be consulted on anything but taxation, and so do not appear again for some time.

VII. **CONCENTRATION.** In proportion as the wealth of the nation and the practice of **taking movables** increased, so did it become **more** evident to the king that more might be gained by **private bargain** with the towns or counties than from an assembly of tenants-in-chief; while the **inconvenience** of this and the possibility of isolated refusals, coupled with the desire to **balance** the upper classes by less haughty vassals, were likely to lead to some more rational mode of national deliberation. The growth of the principle that **no man ought to be taxed without his own consent** would drive the king to some **new expedient**; and then the familiar and complete representative system already in use would afford a **ready substitute** for the feudal assembly of Magna Carta.

1213. Four discreet men are chosen to discuss reforms at **Oxford.**

1215. The feudal council of **Magna Carta.**

1220. The **Yorkshire barons** in the shiremoot refuse to pay the carucage because they had not been **consulted** on the grant.

1254. **Two knights** of each shire are summoned to give a grant, the king being in Gascony.

VI. REPRESENTATIVE ASSEMBLIES.

1254. The king being in Gascony and in great need of money, an assembly was collected to give a grant to which **two knights** elected by the shire were summoned from each shire by a **writ** addressed to the **sheriff.**

The **provisionary government of 1258–64** restricted rather than extended the limits of the taxing and deliberating council.

However an **exception** occurs. The barons summoned **knights** of each shire to a conference at **St. Albans.**

The king retaliated by summoning the same knights to Windsor.

1264. After Lewes, **Simon de Montfort** summoned **2 knights** from each shire to a parliament at London.

1264. Dec. SIMON DE MONTFORT summoned **2** KNIGHTS from each shire by writs addressed to the sheriffs, and also 2 LAWFUL AND DISCREET REPRESENTATIVES FROM THE CITIES AND BOROUGHS by writs addressed to their magistrates.

1267. It is probable they were present.

1273. A great convocation of archbishops, bishops, earls, barons, abbots, priors, **4 knights** from each shire, and **4 citizens** from each borough, assembled to do allegiance to Edward I.

1275, 1278, 1282, 1283, 1292, 1294. Representatives of the commons were present.

1295. TWO KNIGHTS FROM EACH SHIRE, TWO CITIZENS FROM EACH CITY, TWO BURGHERS FROM EACH BOROUGH attended the national council.

This last date **fixes finally the right** of shire and town representation. For though for some years the theory is not strictly carried out, YET FROM THIS DATE NO ASSEMBLY CAN BE REGARDED AS A PARLIAMENT IF IT DOES NOT FULLY CARRY OUT IN THE[1] MINUTEST PARTICULARS OF SUMMONS, CONSTITUTION, AND PROCEDURE THE MODEL THEN ESTABLISHED.

VII. THE THREE ESTATES.

I. **THE CLERGY.** The **Causes of cohesion** which prevented the **higher clergy** joining with the baronage (with whom they acted in the Lords), and **knit** the whole ecclesiastical body into **one estate,** are:

1. **Convocation.** Where they all acted as an united body governed by peculiar laws and transacting ecclesiastical business.

2. **Canon Law,** which separated off spiritual courts and spiritual cases from the ordinary operations of the common law and marked the Church off from the nation.

3. **Church Liberties.** The constant growth of these and the struggles of the clergy for them, divided them from the

[1] Stubbs, *Const. Hist.* iii. 224.

rest of the nation and tended to throw them into opposition.

4. **Taxation of Spirituals.** The discussion of those questions in which the clergy alone were concerned tended to unite the clergy and impart vigour and consistency to the proceedings in convocation; moreover it provoked a **professional feeling** and a professional jealousy which would affect all ranks of the Church.

II. **THE LORDS.** The influences which separated the **Lords** off from the **Commons** were, **not nobility of blood**, for there was no caste in England, **nor tenure**, for the possession of 13 knights' fees, and a third did not make the possessor a baron, while tenancy-in-chief was shared with knights and simple freeholders holding from the crown.

But

1. The **Quia Emptores** (which practically **allowed alienation** while **forbidding subinfeudation**), coupled with the **De donis conditionalibus** (which allowed estates to be bound up by a direct **entail**), tended to create on the one hand a **large** number of **small tenants-in-chief**, and on the other, to **accumulate large estates** in the hands of a few. **Thus a class of landed proprietors on a large scale would be created.**

2. A baron paid a higher relief than the other tenants-in-chief, he could only be tried by his equals or the royal council (which consisted mostly of his equals). **Thus the class of barons was distinctly marked off from the tenants-in-chief in general.**

3. The greater **tenants-in-chief** were summoned to council, &c., by a **special** writ, and never came unless summoned.

Edward I., desiring to **limit** the **national council** of Magna Carta (while desiring a larger assembly than the Consilium Ordinarium) sent special summonses only to a **few** greater barons.

Thus the number summoned to council was **less** than the number summoned to war.

This proceeding was aided by the fact that the **expense** and **inconvenience** of attending made the barons **unwilling** to attend, and therefore **glad** not to receive the writ, though if they had received one they would have felt bound to attend.

It is obvious, therefore, that in time an **idea** would grow up that **attendance** in the **national council depended**

on receiving the special writ; while, on the other hand, when a family had received the writ for several Parliaments in succession, they would be regarded **as having a right to receive it in the future.**

Therefore, PEERAGE **totally divested of tenure** would merely consist in membership of the House of Lords, and **would depend solely on the right of receiving the writ grounded on hereditary custom.**

The **peers**, therefore, would be a class whose numbers would be determined by the will of the Crown (who could add to them by **patent**), limited on one side by the rule of hereditary right.

The growth of this estate, therefore, is mainly due to the defining and legalising tendencies of Edward III.

III. **THE COMMONS.** There are two branches of inquiry:

1. Why did the **minor tenants-in-chief unite with the rest of the shire-court** in electing representatives, rather than appear personally as prescribed by Magna Carta?

Because: *a.* The increase of alienation after **Quia Emptores** had **increased** the **number** of **minor tenants-in-chief** by adding to the class many of the smaller freeholders. Thus the **appearance** of **all** would be **impossible.** One class barrier would be partially removed.

β. The **enforced distraint of knighthood** on all possessed of 20 librates of land would raise the freeholders and form another **bond of union** between them and the minor tenants.

γ. **Expense and dislike** would render most of them unwilling to appear personally.

δ. They had long been **accustomed** to work with the freeholders in the **shire court** and to **elect juries** to represent the shire court in civil, criminal, and other business. It was therefore easy for them to concur in the election of knights to represent the shire court in the Parliament.

2. Why did the **knights of the shire** (*a*) **join with the burgesses** rather than with the barons; or (*β*) why did they not form **a separate class intermediate** between the two?

Because: (*a*) 1. The barons **drew off** from them;

2. They were called together to **criticise** and **consent** to action already **prescribed** by the barons;

∴ **They would be naturally in opposition to the barons.**

β. 1. Being in **opposition** to the barons, which opposition was shared by the towns, they drew to the towns;

2. Common **delegacy** and local influences would unite them;

3. Rising **intercourse** between country and town families.

∴ They would **naturally unite** with the burgesses, though this union would **not be very strong or definite at first.**

IV. **REPRESENTATIVE CHARACTER.** The **Lords** therefore rapidly hardened into a compact crystallized body, which could only be enlarged by the action of the crown, and which represented themselves only.

The **clergy** had two forms:

1. The **spiritual peers** attended the sittings of the House of Lords, acting fully as peers.

2. The **general mass of the clergy** met in their own synods, voted their taxes, and legislated for themselves.

Thus the general mass of the clergy (owing to their steady refusal to send representatives) were **unrepresented** in the Parliament.

The **Commons** (a highly aristocratic body) represented at first merely the freeholders and towns. Later merely the larger freeholders and close corporations of towns. Hence the ill-advised **Statutes of Labourers.**

It is obvious therefore that at the earliest and most open stage a **large part of the realm** (namely the lower clergy and all below the freeholders in the counties) were **unrepresented.**

The whole **course of history** down to **1832** was to **decrease** the **unrepresented** classes.

E.g. A. **COUNTIES. 7 Henry IV.** (which merely declared the custom) stated that the election shall be conducted in **full county court** and that an **indenture** containing the names of the electors shall be tacked to the writ and form the sheriff's return to the Chancery.

1413. 1 Henry V. ordained that the **land** which gave the vote should be **situate** in the county, and that **residence** in a town is the necessary qualification for voting in it.

1430. 9 Henry VI. The first disfranchising statute was passed, declaring that (in consequence of riots at elections owing to the attendance of worthless people) only **resident freeholders** occupying a freehold of the value of 40*s.* per annum should have the right of voting. This reduced the franchise to its minimum. The **shire members,** moreover, were to be **knights** or **esquires,** with

property in land to the value of **20*l.* a year**; excluding yeomen born. Both electors and elected were to be **resident** in the county.

1432. 11 Henry VI. Required that the freehold which gave the vote shall be situate in the county.

The **restrictions as to residence were regularly evaded** from the time of Edward IV.; and the statute having become obsolete from desuetude, was **repealed 14 Geo. III.**

The county franchise therefore remained limited to the **40*s.* freeholders**, while various other forms of landed and movable property were being accumulated in large quantities.

The Reform Bill of 1832 remedied this to some extent. The franchise was given to 40*s.* freeholders of inheritance, or for life with occupation; 10*l.* freeholders for life without occupation; 10*l.* copyholders; 10*l.* leaseholders for 60 years; 50*l.* leaseholders for 20 years; 50*l.* tenants at will.

The Reform Bill of 1867-8 granted the franchise to 40*s.* freeholders of inheritance or for life with occupation; 5*l.* freeholders of inheritance without occupation; 5*l.* copyholders; 5*l.* tenants pur autre vie on any tenure for any lives; 5*l.* leaseholders for 60 years; 50*l.* leaseholders for 20 years; 12*l.* tenants of lands or tenements who have resided in the county 12 months up to the last day of July, and who have been rated to all poor rates and paid all due up to the preceding January 5.

B. **BOROUGHS.** In the 17th century there are **four systems of franchise** in boroughs:

E.g. 1. **Burgage**, originally belonging to all the freeholders, but gradually limited in most cases to the owner of a burgage tenement.

2. **Guild**, belonging to the guild brethren alone.

3. All **householders** paying scot and lot.

4. **Corporation** limited strictly to the governing body.

The **widest is probably the oldest**, as it was customary in Tudor times to confer **Charters** on towns **closing** their corporations and investing the latter with the franchise. Most of the Tudor creations were for the purpose of **obtaining a majority**, and this form of constituency was the most easily managed.

1413. The statute required **residence**. But the rule was evaded. This was made use of at the end of **Charles II.** to obtain

a majority in Parliament. The resident corporators were expelled by the king's commissioners, and great officers of state introduced instead.

By the 18th century the right of voting became restricted to—

a. The **mayor and town council**, self-electing;

β. The **mayor, town council**, and their nominees, the **freemen.**

The Reform Bill 1832 swept away these anomalies, substituting an uniform household suffrage of 10*l.*

The Reform Bill 1867-8 conferred the franchise on **all householders** who have resided for 12 months up to the last day in July, who have been rated to all poor rates and have paid all due up to the preceding January 5;

Also on all **lodgers of 10*l.* annual value** who have had apartments in one dwelling-house for 12 months.

It was not therefore till **1868** that the **Parliament** became a **really representative assembly** of the nation.

CHAPTER V.

PRIVILEGE OF PARLIAMENT.

I. RIGHT OF THE COMMONS TO DETERMINE CONTESTED ELECTIONS.

I. **THE CHANCERY.** The cognisance of election disputes was originally vested in the **King and Council**, who determined them in the **Chancery**, from which the election writ had issued.

In **1384** the town of **Shaftesbury**, however, presented a petition addressed to the **King, Lords, and Commons**, complaining of a false return. The result of the petition, however, is not stated.

In **5 Henry IV.** a similar complaint was made, and the **Commons**, for the first time interfering in these matters, prayed that an examination might be held in Parliament and punishment inflicted on the offenders.

II. **JUSTICES OF ASSIZE.** In **1410** an Act was passed which vested in the **Justices of Assize** the right of inquiring into election returns; inflicting a fine of 100*l.* upon the sheriffs in all cases where the law had been broken; and **condemning candidates** who had been unduly returned to **forfeit** their wages.

In **23 Henry VI.** an Act was passed fixing an additional

penalty in the shape of **compensation** to the **party aggrieved** by the illegal return.

III. **THE COMMONS.** The **House of Commons** in the **16th century arrogated** to itself the **right** of inquiring into contested elections.

In the reign of MARY a committee of the House was appointed to 'inquire if ALEXANDER NOWELL, Prebendary of Westminster, may be of this house or not.' It was decided in the negative.

In the reign of ELIZABETH, **1586**, the House appointed a committee to examine the state and circumstances of the returns for the county of NORFOLK. The Chancellor, on the ground of some irregularity, had issued a second writ, by which another man was elected. In spite of the Queen's peremptory inhibition, the committee inquired into the matter, and declared the first election valid.

In **1589** a **committee** was appointed to inquire into sundry **abuses of returns.**

In **1604**, immediately on the assembling of Parliament, a quarrel arose between them and James I. on this subject. A certain GOODWIN, an outlaw, had been elected for BUCKS against the tenour of a proclamation issued previously by the king. 'The[1] Commons insisted on their **right of inquiring** into the **election** of their **own members.**' The king tried to settle the matter by an appeal to the judges, but the Commons refused to assent. Eventually, however, the matter was compromised; a new writ was issued, and the king confessed that the House was a **court of record.** From this time onward the privilege has never been questioned.

In **1674** occurred the case of BARNARDISTON *v.* SOAME, which arose from the fact that Soame, as sheriff of SUFFOLK, made a **double return**, for which the plaintiff, one of those returned, sued him for maliciously returning the other. In spite of the verdicts of the Exchequer and the House of Lords, the **Commons decided that the return of the plaintiff was good**, and committed the defendant for the double return.

This right was recognised **7 William III.**, which declared 'that the **last determinaton** of the **Commons** concerning elections is to be pursued,' and hence that **double returns were illegal.**

From this time the right of the Commons was invariably and decidedly made use of to decide all questions connected with contested elections.

[1] Bright, *Eng. Hist.* ii. 588.

IV. **COMMITTEES.** This right, which was **at first** so **necessary** and **salutary** to maintain the **independence** of Parliament during the Tudor and Stuart periods, degenerated during the 13th century into a mere WEAPON OF PARTY, which was made use of to secure the election of all the friends of the majority and oust those of the minority.

In 1770, therefore, MR. GRENVILLE'S ACT tried to practically remedy this abuse by giving the settlement of these questions to a SELECT COMMITTEE of the House, who were to be armed with judicial powers and bound by a most stringent oath. However, it was soon discovered that justice was not obtained in this way, for the **majority** would be able to **manage** the **constitution** of the **committee**, and contrive to pack it with their own friends, who would be guided in their decisions mainly by party spirit.

V. **JUDGES.** In **1868**, in order to remedy this abuse, the trial of controverted elections was transferred to the **judges** of the **superior courts of law**, thus returning to the method prescribed by the statute 11 Henry IV., 1410.

II. RIGHT OF THE COMMONS TO DETERMINE THE RIGHTS OF ELECTORS.

In 1702 the Commons for the first time claimed the right to determine the rights of the electors as well as the legality of the election.

The case of ASHBY V. WHITE.

Ashby, a burgess of **Aylesbury**, having been refused permission to vote, brought an action against **White**, the **returning officer**, and some others, and obtained a verdict. The Commons interfered, declaring that they alone had the right to determine the question, and that the action was a breach of privilege. On the other hand, it was urged **that a freeholder was legally entitled to vote** and could not be deprived of the privilege. The Lords, on appeal, decided against White. FIVE OTHER AYLESBURY MEN thereupon brought actions and were committed to Newgate by the Commons for contempt. The Lords passed resolutions condemning this action of the Commons, and a **warm quarrel** broke out between the two Houses, which was only ended by a prorogation. The plaintiffs, therefore, no longer impeded by privilege and supported by the decision of the Lords, obtained VERDICTS AND EXECUTION AGAINST THE RETURNING OFFICERS. Thus this right was left UNDECIDED.

III. FREEDOM OF SPEECH.

1. This right may be regarded as **inherent** in the constitution of Parliament, which from the **earliest times** was a body assembled for the purpose of the free expression of opinion.

Under **Edward III.**, the most 'high-spirited' of all our kings, Parliament frequently discussed the king's prerogative and other matters, without interruption.

2. In **1397** occurred the **first instance** of the VIOLATION of this right. The Commons had delivered to the Lords a bill for the regulation of the king's household, complaining of the number of lords and ladies supported at his expense. Richard asserted that this was an invasion of his prerogative, and demanded that the author of the bill, one SIR THOMAS HAXEY, should be given up to him for punishment. The Commons thereupon surrendered Haxey, who only escaped by reason of his being a clerk.

3. 1 HEN. IV. This arbitrary violation of privilege was **twice reversed** by the **King and Lords**, first on Haxey's own petition, and then on that of the Commons. Thus the **privilege** was **acknowledged** by the **highest judicial authority** (the King and Lords) and by an act of the whole legislative body.

In **1407** on petition, Henry IV. declared that both Houses had the **right of free discussion**, and frequently declared at intervals to various Parliaments.

33 HEN. IV. THOMAS YONGE, a member, declared that he had been arrested and imprisoned six years before for bringing forward a motion in Parliament that the **Duke of York** should be declared **heir to the crown**. The duke was now protector and of course favourable. The king therefore willed that the Lords should provide for Yonge as they thought proper.

1512. 4 Hen. VIII. THE CASE OF STRODE. **Richard Strode**, a member, had been prosecuted in the **Stannary Courts** for having proposed certain bills regulating the tinners in Cornwall, and had been fined and imprisoned. He now complained of this, and his complaint was regarded favourably by Henry VIII., who always supported the privileges of the House of Commons. A **Statute (4 Hen. VIII.)** was therefore passed, declaring **these and all similar proceedings in consequence of words uttered in Parliament void and illegal.**

1541. Parliament for the first time claimed freedom of speech as one of their **undoubted privileges**, and have done so ever since at the opening of Parliament.

4. Under the Tudors and Stuarts, however, this privilege was frequently VIOLATED.

MARY sent a knight to the Tower for his conduct in Parliament.

1566. PAUL WENTWORTH, after the queen had issued a declaration prohibiting any discussion about the **succession**, moved that this was a breach of privilege, and the queen was compelled to withdraw her prohibition.

1571. STRICKLAND, the author of a Puritan bill regulating the **Book of Common Prayer**, was reprimanded and excluded from the House. YELVERTON, however, declared that this was a **breach of privilege**, for they had power to discuss all matters which were not treasonable. The queen was compelled to yield, and Strickland was reinstated.

PETER WENTWORTH, however, was several times imprisoned for his bold speeches in Parliament.

MORICE, attorney for the Court of Wards, was imprisoned for presenting a bill for the reform of the ecclesiastical courts.

5 CH. I. was the last occasion. Sir John ELIOT, Denzil HOLLIS, and Benjamin VALENTINE were condemned in the King's Bench for their conduct in Parliament, the statute **4 Hen. VIII.** being falsely assumed to be merely a **private act for the relief of Strode**, and not a general assertion of privilege.

1641. The **Long Parliament** declared all these proceedings **illegal.**

5. **1667.** Parliament passed a resolution that the Act of **4 Hen. VIII.** was a **general law declaratory** of the ancient privilege of Parliament, and that the proceedings against Eliot, &c., were illegal.

1668. On a writ of error the **Lords reversed** the decision in the King's Bench against Eliot, 5 Ch. I.

THE BILL OF RIGHTS confirmed this privilege finally, declaring that '**the freedom of speech or debates in Parliament, ought not to be impugned or questioned in any court or place out of Parliament.**'

IV. FREEDOM FROM ARREST.

1. This was a most **ancient** privilege.

The LAWS OF ETHELBERT declared that the molestation of a member of the Witenagemote, when it was summoned, was to be punished with a two-fold bot and 50*s.* to the king.

Originally it included the **servants and property** of members, and extended from 40 days before to 40 days after the session.

19 EDW. I. The master of the Temple petitioned the king for leave to distrain for the rent of a house held of him by the BISHOP OF ST. DAVID'S, and was refused on the ground of privilege.

5 HEN. IV. The Commons alleged their immunity, and prayed that **treble damages** should be the penalty for its violation. The king acknowledged their right, but refused the extra penalty.

11 HEN. VI. The Commons obtained a statute granting, in the event of an assault on a member proceeding to Parliament, **double damages** to the aggrieved.

31 HEN. VI. The sole exception was the CASE OF THOMAS THORPE. He was arrested for execution of debt on the suit of the Duke of York. The Lords, on a petition, recognised the privilege, but decided that Thorpe should remain in prison. Probably this was because Thorpe was a Lancastrian and an old enemy of York, who was now in power. This precedent, however, is in revolutionary times and thus of little value.

2. **Release.** Down to the year **1543** members were released when arrested in two days; *E.g.* 1. When taken in **execution**, by virtue of a **special act**; 2. When **confined on mesne process**, by a **writ of privilege** issued by the Chancellor. But in 1543 a new process was introduced; *E.g.* **1543.** GEORGE FERRERS was arrested as surety for another by process out of the King's Bench. The Commons sent their SERGEANT to demand his release, which was refused. The king and lords supported them, and the sheriffs yielded, were summoned to the bar of the House, and committed for contempt.

This novelty they did not repeat till **1575**, when they sent their **sergeant** to deliver SMALLEY, a member's servant.

They continued to enforce this summary mode of redress till before the end of ELIZABETH'S reign it had become the established LAW OF PRIVILEGE, 'that no subpœna or summons for the attendance of any member in any other court could be served **without the consent of the House**; and that persons who obtained or served such process were punishable at the order of the House.'

3. THE CASE OF SHIRLEY, 1604. Shirley, an elected member, had been imprisoned on an execution for debt before the meeting of Parliament. The Commons sent their sergeant to release him, but the Warden of the Fleet, **fearing that he would become liable himself to the creditors**, refused to give him up. The Commons, at a loss what to do, requested the king to order him to be released. This was done; but in consequence of the warden's apprehensions a **statute** was passed which decreed that: 1. An **officer** delivering up a prisoner in obedience to the Commons should **not be liable** to an action for escape. 2. That the **creditor**, at the expiration of the term of privilege, might sue out a **fresh writ**.

This FIRST LEGISLATIVE RECOGNITION of the privilege recognised: 1. Right of **freedom from arrest**. 2. Right of each House

to **set** a privileged person **at liberty**. 3. Right of **punishing** those who make or procure arrests.

4. The **great extension** of privilege gave rise to **various abuses**, and many statutes were passed to limit it.

1770. An act reduced it to the PERSONS OF MEMBERS, no longer protecting their servants or property.

It has always been limited to civil cases; and does not protect against committal for contempt of court (*e.g.* 1873, **Whalley** and **Onslow**, committed and fined by King's Bench for contempt in the Tichborne case).

V. MONEY-BILLS.

1. **1407.** The privilege of the Commons to have the **sole right of initiating money-bills** was first claimed. In answer to a demand of **Henry IV.**, the Lords held a debate on the state of the kingdom, and specified certain subsidies as being necessary for the national defence. The king requested that a deputation of the Commons might be appointed to hear and report, in order that the Commons might as soon as possible comply with the intention of the Lords. **The Commons asserted that this was a breach of privilege**; and indeed it seems to have been customary for the Commons hitherto to propose their own taxation, or have it proposed to them by the king. The king in reply granted that,

A. Each estate should have the right of communing separately;

B. MONEY-BILLS **should always originate in the Commons.**

1593. Another attempt was made by the Lords to encroach on this privilege. A message was sent from the Lords referring to the Queen's want of a supply, and requesting a conference. SIR FRANCIS BACON declared that it had always been the **custom for the Commons to originate supplies**, and that all that the Lords could do was to send a bill to the Commons which, when it had been assented to by the latter, **must again go through the Lords.** The conference therefore failed, and the privilege was triumphantly asserted.

1640. THE SHORT PARLIAMENT. While the Commons were engaged with grievances, the Lords, at the instigation of the king, voted that supply should be proceeded with first. The Commons voted this a breach of privilege, and the Lords acknowledged that the **right of originating money-bills lay solely with the Commons.**

2. **Amendments.** 1671. The Commons successfully disputed

the Lords' right to AMEND a money-bill; and since that year the **Lords have tacitly acquiesced.** Whenever amendments have been made which the Commons were desirous of adopting, they have invariably **saved their privilege** by throwing out the bill and sending up another with the Lords' amendment incorporated.

3. **Rejection. 1860.** The Lords, however, exercised in this year their undoubted right of rejecting a bill for the REPEAL OF THE PAPER DUTY. The Commons held a long debate on the subject, and finally resolved that the Lords indeed had the right of rejecting money-bills, but that the **exercise of this right was regarded with peculiar jealousy.**

VI. APPROPRIATION OF SUPPLIES.

1354. This is the **first instance** of the appropriation of the supplies by Parliament to particular purposes. A subsidy on wool was granted which was to be **applied solely for the purposes of the war.** There are some other instances of this during the same reign.

1377. On the granting of a subsidy for the French war, two London merchants, **Walworth** and **Philpot**, were appointed to **receive** and **disburse** the money for the purpose to which it had been appropriated.

2 & 3 RIC. II. **Regular committees** were appointed to **receive** the supplies and examine the revenue, and thus the right of the Commons to appropriate supplies was fully established.

1404. The Commons granted a subsidy to Henry IV. appropriating it to the **defence of the kingdom**; and two treasurers were appointed and sworn in Parliament to receive it and account for it to Parliament.

After Henry IV., with the single exception of an appropriation under Henry VI., the right was DROPPED.

In **1624**, however, it was revived again, and the money voted for the **Palatinate** was strictly appropriated.

In **1665** the Commons took advantage of the king's necessities for the **Dutch war** to revive this right again. Mr. **Downing** introduced into the subsidy bill a proviso that all moneys raised in virtue of that Act should be **appropriated** strictly to the service of the war; and should **not be issued** out of the **Exchequer** without an **order** in which it should be **specified** that they were **to be paid for such service only.** This clause was carried in spite of the opposition of Clarendon. Charles himself insisted on it, thinking that under such circumstances the bankers would be more ready to advance money in anticipation of the revenue. The idea of **appropriation** had been **growing up** in the **civil wars**, and

was one of the results of the complete authority exercised by the Commons over all expenditure during that period.

The principle, however, was not carried out fully till the REVOLUTION had transferred all power into the hands of the Commons.

From the reign of William III. all subsidies granted by Parliament have invariably been strictly appropriated.

The establishment of this principle together with that of **audit and account** has been a practical transference of government to the Parliament, while at the same time it has **put an end** to the **old struggles** between the **King** and the **Commons** on the **subject of grants**. As it is known almost exactly what is done with the money, Parliament has no hesitation in being liberal for national purposes.

VII. AUDIT AND ACCOUNT OF SUPPLIES.

The right of audit and account was asserted by Parliament as early as that of appropriation, and indeed was a necessary adjunct of the former unless it was intended to become an useless formality.

2 & 3 RIC. II. The **committees** appointed to receive the supplies were also empowered to examine the accounts of expenditure.

1404. The **two treasurers** appointed and sworn in Parliament were entrusted with the duty of examining the accounts of the subsidies. The right, however, dropped into disuse.

In **1666**, however, the demand for large additional supplies for the **Dutch war**, coupled with the indifferent success of the military operations, provoked in Parliament a suspicion of dishonesty in the expenditure of the appropriated money. The Commons, therefore, reviving their ancient right, appointed a committee to inquire into the matter; which inquiry was shortly checked by a prorogation.

In **1667**, therefore, a bill was passed by the Commons by which COMMISSIONERS were to be appointed from time to time with full powers of **auditing the public accounts** and **punishing frauds**.

VIII. JUDICIAL POWER OF THE LORDS.

In 1 HENRY IV. the Commons, who had been greatly alarmed at the way in which the power of Parliament had been used to attack great persons during Richard II.'s reign by the process of **impeachment**, sought to transfer the responsibility from their own shoulders to those of the Lords, by declaring that the **judicial**

powers of Parliament belonged to the Lords alone, and that to the **Commons** belonged only the right of **accusation.**

In **1621** this was confirmed by a vote of the Lower House, which declared that they had **no jurisdiction over cases** which did **not** concern the **privileges** of their House.

In spite of this, however, in the same year, **1621**, the Commons proceeded to impeach and condemn FLOYD (a clergyman who was accused of speaking disrespectfully of the Palatine). The Lords thereupon interfered, considering this a breach of their privileges, and requested a conference. The Commons finally agreed that Floyd should be arraigned before the Lords; and entered a declaration in their journals 'that **these proceedings should not be a precedent towards injuring the privileges of either House.**'

This case finally decided the PROCEDURE OF IMPEACHMENT, giving the right of accusation to the Commons, the right of judgment to the Lords.

CHAPTER VI.

TAXATION.

I. ANGLO-SAXON.

The **fiscal system** of the **Anglo-Saxons** is very **obscure.**

a. The royal revenue was made up in the ORDINARY way out of:—

1. The **rent of folcland** leased to individuals with the consent of the national council.
2. **Fines** and other **proceeds of justice** in which the king shared.
3. A **composition** paid from the produce of what had been the folcland in each shire for the **feorm-fultum** or sustentation of the king.
4. Right of **maintenance** or purveyance in public progresses.
5. **Heriots** and other semi-feudal payments.
6. Produce of wreck, treasure-trove, mines, saltworks; tolls and other dues of markets, ports, and transport.
7. Each shire, moreover, was bound to furnish **ships** in proportion to its number of hides, one for every 300 hides,

and to pay a **fixed sum** or furnish a **fixed contingent** as a composition for military service.

8. Every landowner was liable to the **trinoda necessitas**, or the liability to repair **bridges** and **fortifications** of towns, and to serve in the shire **militia** for the national defence (**bryg-bot**, **burh-bot**, and **fyrd**).

The **assessment** and **levying** of these dues were carried out by the **sheriff** in the shire and local courts. It was usual for him to pay a **composition** to the treasury and then collect what he could, retaining the excess or bearing the loss.

β. EXTRAORDINARY taxation was levied by the king with the **consent** and **counsel** of the **Witan**. The assessment and collection was carried out by the sheriff in the local courts.

The only instances, however, are the **Danegeld** exacted in 991, 1002, 1007, 1011. It was originally levied by Ethelred to pay the tribute to the Danes, but was continued long after the occasion for it had passed.

It was **abolished** by **Edward the Confessor.**

II. ANGLO-NORMAN.

William I., in accordance with his policy of **amalgamating** the institutions of the two races, retained the revenue of his predecessors and added new imposts of his own.

1. REVENUE. *a.* William retained the **royal estates**, the produce of which, according to Domesday, amounted to **£20,000.**

β. He reimposed the **Danegeld** at a greatly **increased** rate. In 1084 **six shillings** a hide was demanded, three times the old amount. This impost levied from two-thirds of the hidage of England would amount to **£20,000.**

γ. **Feudal revenue,** consisting mainly of:—

a. The **three regular aids,** to marry the eldest daughter, to knight the eldest son, and to ransom the lord.

b. **Reliefs,** wardship, marriage, ousterlemains, &c.

These do not become very important under William, but his **successors** obtained a **large revenue** owing to the uncertain amount. It therefore became the **object** of the **barons** to have the amount of each **defined** by law.

c. **Fines** and other **profits of jurisdictions**; at first not very remunerative.

d. The old rights of **trinoda necessitas** and **purveyance.**

2. ASSESSMENT. In order to ascertain for taxative purposes the exact amount of land, its capabilities and liabilities, a **great recognition** by **sworn inquest** was made. The king's barons exacted an oath from the sheriff and all the barons of the shire; **12 legal men** appeared as the representatives of each hundred, and the **reeve, priest, and six men** from each borough. From the sworn report of all classes an exhaustive land register was drawn up, called the DOMESDAY SURVEY. It contained an exact account of the name, owner, and extent of each manor or township; its tenants, free and unfree; its woods, meadows, pastures, mills, fisheries; the several and collective **value** of each holding.

The result was a **permanent authority** for **assessment** of the land, from which alone taxes were raised. For though later taxation was based mainly on the **knight's fee** instead of the **hide**, yet much of the **general taxation** was collected on the old plan, and, moreover, the number of hides which a knight's fee contained being known, the number of knight's fees in any particular holding could easily be computed.

During the early Norman reigns, therefore, the **general taxation of the country was assessed on the Domesday rating**, and collected by **sheriff**, who twice a year made a **financial report** to the **Exchequer** or financial side of the permanent council, and paid his dues by instalments.

3. GRANT. During the Norman period the **national council** was merely a **consultative body**, and though it is possible that William may have consulted them on taxation, there is no trace or likelihood of any opposition or even deliberation. Their consent, in fact, was a mere **matter of form**, which no doubt was regularly demanded and as regularly given.

III. THE EXCHEQUER.

The **Exchequer** was the **permanent council** of the king in its **financial session**, when it met to transact the accounts of the kingdom.

1. It consisted of the **great officers of the household** and the **judges of the Curia Regis.**

2. It was the **court** in which the whole **financial business** of the country was transacted. As, moreover, the whole **judicial** and **military system** was dependent on the fiscal officers, it reviewed annually the entire social framework.

3. Full **sessions** were held at **Easter** and **Michaelmas** in the palace at **Westminster**, when the sheriffs made their reports.

4. **Two chambers** were used for the business:

   a. **Upper** or chamber of **account**; where **reports** were received, negotiations recorded, &c.

   β. **Lower**, or chamber of **receipt**; where the **money** was paid and weighed.

5. The **records** were kept in **three rolls**:

   a. The treasurer's or **Pipe Roll**: } these were du-
   β. The chancellor's or **Chancery Roll**: } plicates.

   γ. One kept by a **king's officer**, in which special matters were registered.

   There is only **one pipe roll of Henry I.**, but they are **complete from Henry II.**
   The **Chancery Rolls** are nearly so.

6. The **Exchequer** does **not appear** till the reign of **Henry I.**, and its origin is doubtful.

IV. HENRY I.

I. REVENUE. *a.* **Ferm of shire.** This was a **composition** for all the old claims of the king on the shire (rent of folc-land, **feorm-fultum**, profits and fines from the shire-moot and other items.)

β. **Danegeld**: **compounded** for by the sheriff at a fixed sum. These compositions left room for great **extortion** on the part of the sheriff.

γ. **Pleas of the Crown**: **profits** arising from the trial of offences which had been separated from the ordinary operation of the local courts [**murdrum** (the fine payable by the hundred in which a murder has taken place in case of its failing to prove the slain man to be an Englishman), **fines** for non-appearance in the local courts, &c.]

δ. **Feudal income.** Reliefs, wardship, and marriage, aids, escheats; **sale of public offices**; **fines** inflicted in the **forest courts.**

II. ASSESSMENT. The **changes** in the ownership of land, and the formation of new forests, made it **difficult** to **assess taxation** solely by the **Domesday** rating. Under **Henry I.** a **commission** of the **Barons of the Exchequer** (who, under Henry II., were

called the **itinerant justices**) went round the shires and ascertained from each landowner the number of **hides** for which they owe Danegeld, and the number of **knight's fees** on which aids and reliefs are due.

This **commission** also **assess** the contributions of the **towns** which had, as a rule, by now, with a view to **escape the extortion** of the sheriff, obtained a **charter** letting the town to the burghers at a **fee farm rent** equal to the valuation of the town (this valuation was deducted from the ferm of the shire and was called **firma burgi**.) It was apportioned among the holders of tenements in the town, and, in consequence, they were called **burgage tenants** holding on the **tenure** of paying their **share of the firma burgi**.

III. GRANT. **Henry I.** speaks of an **aid** as 'auxilium quod mihi barones dederunt,' but there is no other evidence that the council had any share in the imposition of taxation. It is probable, therefore, that their consent was still **formal**.

V. HENRY II. RICHARD. JOHN.

I. REVENUE. **Indirect taxation** was as yet **obscure** and of no importance.

Direct was mainly levied on **land** and later on **movables**.

These three reigns resulted in numerous changes and extensions of taxation.

A. ON LAND. 1. **Henry II.** brought under contribution the **Church lands** which claimed immunity.

2. He adopted the **knight's fee** as the **basis of rating** for knights and barons.

3. In **1156** and **1159** he raised a new tax, **scutage**, at 20*s*. on the knight's fee and, later, two marks as a **commutation for military service**.

4. **1163 Danegeld disappears**, but was succeeded by **donum** or **auxilium**, which was the same tax under a different name, only **more profitable** because it was paid in full and not by composition.

5. Under **Richard** the same tax appears as the **carucage** levied on the carucate or **100 acres**.

B. ON MOVABLES. 1. **Henry II.** made also a step towards taxing **movables** when he issued the **Assize of Arms**, for under it movables rendered the owner bound to equip himself with arms in proportion to the amount he possessed.

Moreover, in the ordinance of the **Saladin Tithe** **personal property** is rendered liable for its **tenth.**

But **Henry** **never** directly taxed movables for **revenue** purposes.

2. It was introduced in **1193**, when **movables** were taxed one fourth for **Richard's ransom.**

3. In 1204 **John** exacted one **seventh** from the barons, and this was found so profitable that in 1207 he exacted one **thirteenth** from the whole laity. The increasing value of taxes on movables caused them to be **continued** and makes a great increase in the material wealth of the country.

All classes, therefore, were included in the new taxation:

1. **Tenants in chivalry** by **scutage.**

2. **All landowners** by **donum** or **carucage.**

3. **All the people** by the taxes on **movables.**

But they were rarely all levied at once.

c. The **feudal** and **judicial** payments still brought in **large** sums.

II. ASSESSMENT. *a.* **Domesday** was still the **rate book** for taxes on land, but the **donum** was usually assessed by **agreement** between the financial commission (**itinerant justices**) and the tax-payer. This, however, was an **uncertain** method, dependent on the honesty of the latter.

β. In the **Assize of Arms** and the **Saladin Tithe**, the liability of each man was declared on oath by a **jury** of the vicinity before the itinerant justices.

γ. This **plan** was so **successful** that it was **made use of** to assess the **carucage of 1198** and for future assessments.

δ. **Tallages** were chiefly raised by a **poll-tax** bearing equally on all, and the iniquity of this produced the riots in London under **Fitz Osbert.**

III. GRANT. *a.* **Before Magna Carta** the **consent** of the council was **formal**, and the feudal fiction regarded a tax as a voluntary offering. If therefore any **individual refused** it, as **Becket** in 1163 objected to Henry's manipulation of the **Danegeld**, and **Hugh of Lincoln** to furnish money for Richard's French war, **1198**, this merely implied the **non-assessment** of the individual.

β. **Magna Carta**, however, provided that **no aid or scutage** but the three regular aids should be imposed without the **consent**

of the national council, **defining the constitution** of the council, and stipulating that the **consent of those present should bind the absent.**

γ. But still, as **all classes** were **not represented,** it was customary to **consult the shire-courts,** and so the theory of individual consent was not eliminated, though in practice the consent of the council was held to bind the kingdom, and **individual opposition** might be **overborne by force.**

VI. HENRY III. EDWARD I.

There are many instances during this period that the **limitations of Magna Carta,** with regard to the constitution of the national council, were **behind their time.**

It is obvious that the consent of the barons is not enough. The **shire-courts** are **frequently consulted,** either by commission or by representatives.

Taxation, morover, was **discussed** in the council with some **acrimony** during Henry III., and in many cases refused.

There were therefore two principles springing up:

1. **That no man ought to be taxed without his own consent,** which culminated at last in the Parliament of 1295, which represented all classes.

2. **That no taxes ought to be imposed without the consent of Parliament;** which produced the numerous statutes limiting the king's power in this respect.

VII. STATUTES.

25 Edward I., or the CONFIRMATIO CARTARUM, declared 'that no aids except due and customary ones should be taken but by the common consent of the realm.'

34 Edward I., or DE TALLAGIO NON CONCEDENDO, 'No tallage or aid shall be levied by the king without the consent of the archbishops, bishops, abbots, earls, tenants-in-chief, burgesses, and other freemen.'

1340. A statute was passed finally abolishing unauthorised TALLAGES.

1362. A statute was passed prohibiting any increase in the customs on WOOL.

1628. THE PETITION OF RIGHT protests against any charge being laid on the subject without the common consent of the realm by Act of Parliament.

1689. THE BILL OF RIGHTS declares 'that levying money

for the use of the crown by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal.'

This series of **Declaratory Acts**, therefore, clearly **established** the fact that whatever **rights** the **crown may have had** in the way of prerogative **before Magna Carta**, it **no longer** possesses the right to **increase** the revenue granted by Parliament by the **exercise of prerogative** on the property of the subject.

VIII. EVASIONS OF STATUTE LAW.

I. **TALLAGE.** 'The[1] right of the king to **tallage demesne** was **not so distinctly abolished** by the **Confirmatio Cartarum** as to leave no room for **evasion**.' The king could plead that he only surrendered the power of generally tallaging the nation, not of tallaging his own estates or demesne.

1304. Therefore **Edward I.** ordered a **tallage** on all his demesne.

1312. **Edward II.** ordered a **tallage**, and though the citizens of London opposed it, they based their opposition on their own **immunities** confirmed by Magna Carta, not on the clause of the Confirmatio.

Other cases also occurred in **Edward II.** and **Edward III.**

1340. **The second Statute** contained a clause that the nation should not be compelled to pay any aid or charge but by common consent of Parliament.

II. **SCUTAGE.** This was falling into **desuetude**, having ceased to be remunerative. 'It[2] **occasionally** appears as a tax payable when the king went to war **in person**.'

Richard II. remits it after his **Scotch expedition** in 1385; from this time it becomes unimportant.

III. **CUSTOMS.** 1. *a.* **Taxation of wool** first became of importance under JOHN, owing to the **great increase** of the wool of the country, and especially of the **Cistercian** order.

β. MAGNA CARTA established **freedom of trade**, subject, however, to ancient and right **customs**. These ancient customs were levied on wine, wool, and general merchandise. The king had the right of exacting **one cask** for every **ten** which the ship contained (**prisage**). The customs on wool and merchandise were levied very irregularly.

2. *a.* **1275.** Parliament gave to EDWARD I. a **custom of half a mark on the sack, and 300 woolfells, and a mark on the last**

[1] Stubbs, *Const. Hist.* ii. 517. [2] *Ibid.* ii. 521.

of leather. This is the **origin of the custom on wool.** It was levied on exports, and was called **custuma antiqua sive magna.**

β. 1303. The MERCHANT STRANGERS, in consideration of certain privileges, granted a sum of 40 pence on the sack and 300 woolfells, and half a mark on the last. This was the **custuma nova et parva.**

γ. 1303. CARTA MERCATORIA regulated the customs on **general merchandise** at fixed rates. After a long struggle between the king and the Parliament, they became part of the ordinary revenue of the crown, receiving legal sanction in the STATUTE OF STAPLES in 1353.

δ. From 1297 to 1362 a **long struggle** went on between Parliament and the Crown over the **wool.** The **merchants,** who at first leaned to the king, were compelled to **join** with Parliament to **escape** the **royal exactions,** and in **1362 a statute** was issued **prohibiting unauthorised taxation of wool.**

ε. In **1308 Edward II.** persuaded the **English** merchants to **buy off** the **prisage** by paying 2 shillings a tun on wine. Similar negotiations occurred later. In 1373 it was **granted** in Parliament for **two years,** and from that time was granted at first for **years,** and **later for life.** This was the TONNAGE AND POUNDAGE, which gradually included wine, beer, and all merchandise, imported or exported, except the staple commodities (wool, sheepskin, leather, tin, woollen cloth).

3. From the reign of **Edward III.** to that of **Mary no attempt** was made to enhance the taxation of merchandise, for the statutes which occur either refer to other **impositions** of a **different nature,** or else are merely **declaratory** of the law.

4. MARY laid an **imposition** on **cloth,** owing to a **special cause,** which was to prevent defrauding the revenue by the manufacture of taxable wool into untaxable rough cloth for exportation. This tax, therefore, being obvious and just, was continued, though strictly it was illegal.

5. MARY laid a tax of **40 shillings** a **ton** on **French wine** and **commodities.** At this time, however, the two countries were at **war.** Repealed 1 Eliz.

6. *α.* BATES' CASE, 1606.[1] Cecil finding a deficit of 80,000 annually, enhanced the customs to increase the revenue. **Bates,** a Turkey merchant, refused to pay the tax of 5*s.* per cwt. on currants in addition to the regular poundage of 2*s.* 6*d.* He was

[1] Abbreviated from Broom's *Const. Law.*

cited in the Exchequer, and though he relied on the statute law, the judgment was for the Crown.

Arguments for the Crown :—

1. The king's power is **two-fold**, ordinary and extraordinary. The **latter** is **above** the **common law**;

2. **Customs** are the effects of **foreign commerce**, and all **foreign affairs** are in the **absolute power** of the king;

3. The **sea-ports** are the **king's gates** which he may **open** or **shut** on what **conditions** he pleases.

β. A **book of rates** was now issued, July, 1608, under the great seal, by which heavy duties were laid on nearly all mercantile commodities.

γ. Parliament took the matter up, and after a long debate **petitioned** the king 1610, against the illegal customs on the following grounds :—

1. From the **Conquest** to **Mary** there are only **six** cases of impositions. These were removed when complained of.
From **Mary** to **James** there are only **two**. These were for **special** circumstances;

∴ **Precedents are against it.**

2. If the king had the power of increasing taxes without consent of Parliament, this power has been expressly **abrogated** by **Magna Carta, Confirmatio, 14 Edw. III.**
This petition was **unsuccessful.**

7. The right of enhancing the customs was swept away by 16 CAR. I. and the declaration in the BILL OF RIGHTS.

IV. **NATIONAL DEBT.** During the Plantagenet reigns it was impossible to prevent the king's borrowing from **Jews, foreign bankers, rich men,** or the **Church,** which debt in the long run the nation had to pay.

It was **Henry III.'s anticipations** of his revenue which mainly produced the Provisions of Oxford.

Many **Lombard bankers** were **ruined** by the refusal of the nation to pay **Edward I.'s** debts.

V. **PURVEYANCE AND PRE-EMPTION.** α. This was the right of **buying provisions,** &c., for the **king's use** at an appraised value, and of **impressing** labour and carriage.

This right of very ancient date was **extended** to include all the household, while the purveyors abused their power.

It thus became **oppressive,** and was limited by statute.

β. MAGNA CARTA. 'No constable or other bailiff of ours

shall take corn or other chattels of any man unless he presently gives him **money** for it, or has respite from the seller.'

ARTICULI SUPER CARTAS. 1300. 'None shall take **purveyance** within the realm save the **king's purveyors**'—'who must **show** their **warrant** before they take anything'—'and shall take **no more** than is **needful** or meet to be used for the king, his household, and children.'

DE TALLAGIO NON CONCEDENDO. 1306. 'No officer of ours or of our heirs shall take **any goods** of any person **without** their goodwill and **assent**.'

25 EDW. III. 'Corn and victuals taken for the king's use shall be **appraised** at their **rightful value**.

1362. STATUTE OF PURVEYANCE declared that the right was **only** to be **exercised** on **behalf** of the **king** or queen: the hated name of purveyor was to be changed for that of **buyer**; and payments were to be made in **ready money**.

γ. The abuse however continued, and was frequently complained of by Parliament, nor was it till **1660**, when, having fallen into disuse under the Commonwealth, it was **relinquished** by Statute 12 CAR. II.

VI. **FORCED LOANS OR BENEVOLENCES.** *α.* Forced loans were resorted to by Henry III. and Richard II. EDWARD IV. however invented the **benevolence**. In 1472, on the plea of a war with France, he called his wealthiest subjects before him and declared to them the impoverished state of his exchequer, demanding of each of them a large sum of money.

β. 1486. RICHARD III. passed a **statute** against this practice, which had become an intolerable burden to the country. **Benevolences** in themselves were **not unconstitutional**, and were really a recognition of the sole right of Parliament to tax; but beginning as a free gift they soon became compulsory owing to the power of the asker.

γ. HENRY VII. however **disregarded** this statute as the act of an **usurper**. Benevolences were from time to time enforced, and the intolerable exactions of **Empson** and **Dudley** enabled Henry VIII. to acquire great popularity on his accession by their punishment.

HENRY VIII. maintained his right to receive **free presents**, but the instance of **Reed**, who was sent to Scotland to endure 'the sharpe discipline militar of the Scottish war,' shows that there was considerable danger in refusing this free gift.

Under the **Tudors** and **Stuarts** forced loans were frequently enforced.

δ. Under CHARLES I. the collection of a forced loan led to the

proceedings in DARNEL'S CASE, and the debates in Parliament which followed in 1627. **Sir E. Coke** declared that it was the law of the land, that 'the king cannot tax any by way of loans.'

1628. THE PETITION OF RIGHT embodying this declaration which was conformable to the spirit of the law, complained that commissions under the Privy Seal had collected benevolences, and prays that '**no man be hereafter compelled to make any gift or benevolence without common consent by Act of Parliament**, and that none be molested for it on refusal.'

Forced loans were **continued** by Charles I., however, during the period of his arbitrary rule without a Parliament.

c. 13 CAR. II. finally settled the law of the question by declaring, that '**no commissions** or aids to receive voluntary **subscriptions** from subjects can be **issued but by consent of Parliament**,' but that with the consent of Parliament it is lawful for the king 'to issue commissions under the Great Seal for receiving voluntary subscriptions.'

VII. **FINES.** One of the most important items of the royal revenue at first were the **fines** and **amercements**, and penalties to which the king was entitled either wholly or in part. It became necessary, however, to **limit** the exercise of this branch of prerogative to protect the subject.

MAGNA CARTA. 'A freeman shall **not be amerced** for a small fault, but **after the manner of the fault**, and for a great fault after the greatness of it, **saving to him his means of livelihood**; and a merchant likewise, saving to him his **merchandise**; and a villein in the same way shall be amerced, saving to him his **wainage**.'

STATUTE OF WESTMINSTER I., 1275, repeats the words of Magna Carta almost exactly.

1352. STATUTE OF TREASON defined the limits of this offence in order to prevent the king including various minor offences under this head, in order to inflict the **heavy penalty of forfeiture** to the crown.

During the **16th and 17th centuries ruinous fines** were inflicted by the law courts, and especially the **Star-Chamber.**

The BILL OF RIGHTS declared that 'Whereas the late king James II., by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert the laws and liberties of this kingdom' in various ways; and among others by imposing 'excessive fines;'—'**excessive fines ought not to be imposed.**'

VIII. **MONOPOLIES.** 1. The crown had always assumed the right of **regulating** through the **council** all matters of **commerce**

and **trade**. In this way it was possible to tax the people indirectly by granting **privileges or monopolies** for sums of money.

William the Conqueror granted privileges to the cloth **weavers** for a sum of money.

'One' of the forms of royal exaction was to open a **fair** and enforce the closing of all other shops in the neighbourhood as long as it continued.'

The STAPLE TRADE was managed in this **paternal** way as well. The **staples** were perpetual **fairs** regularly organised, where alone the chief productions of England could be sold. These were therefore called **staple commodities**. The staple towns were at first cities of Flanders, and to reward any particular town or ally the staple might be removed there. EDWARD III., hoping to keep the advantages of the staple trade in England, named **nine towns** there which were to have the exclusive rights of staple markets. This plan did not answer, as it enhanced the price to foreign merchants and destroyed the English mercantile navy. 'It [1] was therefore speedily abandoned, and after Henry VI. **Calais** became the **sole English staple town**.'

After various attempts to prohibit foreign imports, the greater part of the **foreign merchants** were formed into a **guild** with regular **privileges**, and were known as the **merchants of the Steelyard**.

The **coinage** was a royal monopoly.

2. Later, as new branches of trade began to be opened up, the crown claimed the right of granting the **monopoly** to individuals or companies in return for payments, which proceeding, though it **enhanced the price** to the consumer, was certainly a judicious encouragement to enterprise and invention.

MARY granted the monopoly of the **Russian trade** to a company.

3. ELIZABETH extended this to almost **every article of domestic trade**. Patents of monopoly were granted generally for exclusive dealing in foreign articles, but in some cases reaching even to salt, leather, coal, and other necessaries. The courtiers who obtained them sold the right to companies of merchants. Thus the **price** was considerably **enhanced without** the **revenue** being much **increased**.

Several **attacks** were made on this iniquitous system by the **Puritan Commons** in the latter years of Elizabeth, and in **1601** a bolder and more **successful attack** was attempted in spite of the opposition of Robert Cecil and Bacon, who talked loudly of prerogative. After four days' eager debate, **Elizabeth** wisely **ap-**

[1] Bright, *Eng. Hist.* i. 257. [2] *Ibid.* i. 257.

peased the angry House by a **declaration** that she would revoke all grants that should be found injurious by fair trial at law.

In spite of this declaration and the joy of the Commons, they were not all revoked, and a **long list** of them existed in 1603.

JAMES I. made use of this **evasion** to obtain money during 1614–1621, when his policy of ruling without Parliament was temporarily realised. **Licenses** and **patents of monopoly** were granted for large sums, and both government and the monopolists reaped a large harvest from the consumer. The odium fell mainly on the monopolists, and of these the most odious was **Mompesson**, who had a patent for **gold and silver thread**, and also a patent for licensing inns and alehouses, in which he used extreme violence and oppression.

The **Parliament of 1621** attacked **Mompesson**, who fled, and **Michell**, a justice of the peace, who had been the agent of Mompesson's tyranny. The two were solemnly **impeached** with **Bacon** and others, the Parliament by this act reviving their ancient and salutary right which had fallen into disuse among the Tudors.

CHARLES I., during the years of his **arbitrary government**, 1629–40, raised **large sums** by this indirect form of taxation, granting **monopolies** of coal, iron, salt, soap, leather, tobacco, beer, butter, linen, hops, and buttons. Thus the patentees of a new soap, which experience proved very bad, agreed to pay 30,000*l.* for two years and 40,000*l.* for the future.

16 CAR I. and the Declaration in the BILL OF RIGHTS destroyed all opening for indirect taxation.

IX. **SHIPMONEY.** During the years 1629–40 a new expedient was devised by **Noy, the Attorney-General**, for raising money without help of Parliament. This was the famous **shipmoney**. The writ was issued October, 1634, and the refusal of **Mr. Hampden** to pay 20*s.* assessed on him brought the matter to a **judicial decision.**

THE CASE OF SHIPMONEY.[1] ARGUMENTS FOR THE DEFENCE:

1. **Statute Law** forbids the king to levy money without the consent of Parliament. These statutes are **Magna Carta**, the **De Tallagio**, and the **Petition of Right**;

2. The **general defence** of the kingdom is provided for by **tenure of land**, by the king's prerogative, and by subsidies in Parliament; the **sea** has **nothing specially** appointed;

∴ The tax is illegal.

Moreover:

3. All **precedents limit** it to **maritime** towns; whereas this

[1] Abbreviated from Broom's *Const. Law.*

is extended to inland ones. There could be no **special** danger warranting this innovation, as a **year's notice** of payment was given.

4. It is **inconvenient** in times of no danger to set an example for sudden and arbitrary taxation.

Moreover **Crooke**, one of the judges, declared that the king **could not levy it by prerogative, for such a prerogative did not exist.**

Five judges voted for **Hampden**—**three** on **technical** grounds; **seven** voted for the **king.**

ARGUMENT FOR THE KING:

'**No law can bar the king of his regality.**'

This decision gave great offence to the nation, because now no man's property was safe.

The **Long Parliament** declared all the proceedings contrary to laws and statutes, and annulled them. 16 CAR I.

The declaration in the BILL OF RIGHTS finally settled the question.

CHAPTER VII.

THE KING'S COUNCIL.

I. THE CURIA REGIS.

I. **ORIGIN.** The king's council no doubt originated in **necessity** and **practical utility**;

1. **Necessity.** 'A feudal king had more to **fear** from the **isolation** than the **concentration** of his vassals.'[1] If left to themselves, the **feudatories** whose power he had been unable to reduce to the harmless point, might, in **imitation** of the great vassals of the King of France, concede to William a mere **nominal** kingship, while remaining in **practical isolation and independence.** This **disintegrating** influence would be materially aided by the **provincial feeling** which had prevented England uniting against the Norman, and which still existed, and did exist until the **centralised administrative** system of Henry II. destroyed it. It was obvious, on the other hand, that if William were able to **collect** these feudatories around him, to **sink** their **growing independence** into submission, and to change them from turbulent equals into **mere**

[1] Dicey's *Arnold Essay.* Privy Council.

councillors acknowledging his superiority, he would at once **strengthen his own power** and would to some extent **consolidate the divided kingdom.**

2. **Practical utility.**—In early days, when kings were bound by few, if any, constitutional limitations, it was their **privilege** rather than their duty to receive council. A **strong king**, like William I., whose power was almost **unbounded**, would perceive the **advantage** of possessing a body of councillors with whom matters of importance might be discussed. They were likely to give him, **if not good, at least honest advice, and he was not bound to take it if it was unacceptable.** The advantage of being able to get **good advice** from men who were at once **experienced** and likely to be unprejudiced was obvious and great to a king who was **strong** enough to render all **opposition fruitless.**

On these **two grounds** no doubt William was induced to **continue** in a more Norman form the **National Council** which existed in Saxon times. At the same time his **accession as the heir of Edward the Confessor**, and the consequent continuity of many English institutions, would be an **additional reason** for the retention of an institution so fraught with advantage now that it was shorn of any dangerous powers.

II. **CONSTITUTION.** Under William this **council**, thus continued, is a **mere feudal court**, whose rights, though theoretically great, being the same as those of the old Witan, are **practically merely nominal.** It is therefore simply a **consultative** and **consenting** body, whose advice and consent are always asked and given as a **matter of course.**

IT HAS THREE FORMS:

1. **Ordinary** = the great officers of the household and **some of the magnates** and bishops;
   = the **permanent council**, which always attended the king and transacted all business which came before him personally;
   = the **consilium ordinarium**, which developed into the **Privy Council**, the **Law Courts**, and the **Chancery.**

2. **Extraordinary** = the great officers of the household, **all the magnates** and bishops, and **some of the other tenants-in-chief**;
   = the **Common** or **Great Council**, which met three times a year on **special** occasions, when the king wore his crown, and which

differed from the permanent council constitutionally only as regards numbers. As long, moreover, as the **king possessed the power of enlarging the numbers of the Consilium Ordinarium, and diminishing that of the Common Council,** the **difference** between them even in constitution was extremely **small.** Nor was it till the defining action of the **Edwards** had closed the ranks of the peerage, that the king's council and the assembly of tenants-in-chief became finally **distinct.** This second form, in its earlier state, and shorn of the minor tenants-in-chief added by Henry II. and Magna Carta, developed into the **House of Lords.**

3. **Theoretic = all the landowners.**

This form was only realised **occasionally,** when the nation assembled in arms for some purpose, as at **Salisbury** in **1086,** to take the oath to William.

This **third form** of the council ultimately, by the help of the representative system, developed into the **Parliament, absorbing** the Common, or Great Council, as the House of Lords.

The first two forms (the **Ordinary and Common Councils**) constituted the CURIA REGIS, a term which in Norman times was used **indifferently** for either.

III. **PERMANENT COUNCIL.** 1. ITS MEMBERS.

a. **The officers.** The Steward, the Constable, the Chamberlain, the Butler. (**These four offices were at first of great importance; gradually, however, their power became transferred to other officials, while the office itself, reduced merely to a grand-serjeanty, became hereditary in certain families.**)

The Justiciar, the Treasurer, the Marshal, the Chancellor. (**The first three gradually acquired the powers of the steward, constable, and chamberlain. The marshalship, however, became hereditary, and lost a great deal of importance. The justiciar became secundus a rege, until his power was absorbed by the chancellor. The really important official places, such as the justiciarship and the treasurership, were usually sold to ecclesiastics. This system prevented them becoming hereditary, and ensured efficiency and**

honesty to some extent, owing to the buyer's fear of losing the place.)

The Comptroller of the Household, the Chancellor of the Exchequer, the Judges, the King's Sergeant, &c.

β. **The magnates.** The two Archbishops (**who claimed a right to sit in every council**).

Several bishops (**who might at the same time be administrative officers, or who might be summoned on account of reputed wisdom**).

Some of the barons and earls (**summoned on account of importance, or claiming to attend of right**).

The line between the magnates and the officers was **not closely drawn,** as most of the officers were also ecclesiastical or lay magnates.

2. ITS DUTIES.

Its duties were mainly executive and judicial, though it also took part in acts of legislation.

It had, as it were, **three phases** :

a. An **executive** : it acted to some extent as a body of **ministers** carrying out the behests of the king.

β. A **legislature** : **declarations of the law** and **alterations** and improvements of it were mainly issued through the council. The **assizes** of Henry II. were generally promulgated with their advice and consent.

γ. A **law court** : As a **law court** it transacted all business brought before it as a court of **first instance,** and as a **court of appeal.** As a court of first instance, moreover, it would assume various phases, being **presided** over by a **different officer** according to the nature of the case.

Thus the difference between these various aspects of the council lay more in the **nature of the business, the president, and place of meeting,** than in the nature of the court, or assembly, in which the affair was transacted.

E.g. The **Marshal** as a rule attended to **military** matters, and so would preside over the council, or portion of it, when it met to discuss military matters.

The **Chancellor** similarly would attend to all matters affecting the **royal grants.**

The Curia Regis, in fact, in its **ordinary form,** was merely the **instrument of the king.** The king, being at once ruler and judge of the nation, was possessed of **unlimited** power, which he **exer-**

cised mainly through the **Curia.** If, therefore, the Curia seems to be possessed of great and undefined powers, it is **because the** KING **was actually possessed of them.**

IV. **DEVELOPMENT.** Under the **defining hands** of **Henry I.** and **Henry II.** the Curia Regis began to lose its old shifting, uncertain characteristics.

1. The **National Council** becomes **distinguishable** from the King's Council, though it is still merely a very **full session** of the King's Council.

2. The great press of **business** in the **Permanent Council** made it **impossible** for the council to transact it all. It became customary, therefore, to refer **technical** business to **committees** of the council, **presided** over by that officer whose duty it was to attend to it.

a. One **committee,** therefore, of the council, assisted by the **chaplains of the royal household** as clerks, transacted all the **financial** business of the country, accounted with the sheriffs, and decided financial suits. This committee was called the **Exchequer.**

β. Most of the **dignitaries** of the household had a **staff of servants,** over whom he exercised **judicial functions,** while he had always assumed a prominent position in all cases affecting his department which were brought before the council. These powers developed into REGULAR COURTS, with cognisance of all offences committed, or disputes arising, in his department. Hence the origin of the courts of the **High Steward,** the **Constable,** and the **Marshal.**

γ. But most of the **judicial** rights of the Council were still exercised by the **whole body** in session.

3. These **committees** gradually became more **definite** still.

a. The **Exchequer,** assuming a more **distinctly judicial aspect** under the name of the **Curia Regis,** acquires more extended judicial rights by the exercise of the **full judicial** powers of the **council.** The financial business of the country is transacted by this **court in a financial session,** when it is called the **Exchequer.**

The real change effected is that—

(1) **Under Henry I. the Exchequer transacts financial business, and incidentally tries financial suits** (its financial character being the most important).

(2) **Under Henry II., however, the Curia Regis transacts**

judicial business principally (the most important), **and also financial business secondarily** (calling itself the Exchequer).

Therefore, under Henry II., the words '**CURIA REGIS**' have two distinct meanings.

(1) Curia Regis, in its **widest** sense, is the general name for the **Consilium Ordinarium as a legislative, executive, and judicial body.**

(2) Curia Regis, in its **narrowest** sense, is the term used to describe the **judicial committee of the Consilium Ordinarium.**

β. The **other committees** become **more definite** courts, with distinct jurisdictions.

4. This **defining and hardening tendency** proceeded still further, drawing **sharper lines** between the divergent offshoots of the original council.

α. In **1178 Henry II. reformed the Curia Regis** (judicial committee), cutting down the 18 judges to 5, who were to try all cases, **reserving** the more difficult ones for the **king in council** (the Curia Regis from its appellate point of view). These 5 judges were to try all cases nominally **coram rege.** This court was therefore called the **Court of King's Bench** (**Curia Regis coram rege**). There were, therefore, now **two courts,** the Courts of Exchequer and King's Bench.

β. **1215. Magna Carta fixed** the court for trying **Common Pleas** at Westminster. There were therefore now **three courts,** the Courts of Exchequer, King's Bench, and Common Pleas, with the Court of Appeal (the king in council).

γ. Under **Henry III.** and **Edward I.** these three courts of first instance became definitely **separated** from one another, with **separate colleges of justices, presidents, and jurisdictions.**

V. **RESULT.** The **Consilium Ordinarium** thus by **1215** had transferred most of its judicial powers to the law courts and official courts, retaining, however, its rights as a **court of appeal,** as a **court for affording summary relief** in unusual cases, and as a **court of first instance for tenants-in-chief,** which last right was generally exercised in the fuller session of the National Council.

The following **table** shows the **change** which had come over the old Curia Regis of William the Conqueror :—

I. ANGLO-NORMAN

- α. Curia Regis
  - Permanent Council = executive, legislative, court of appeal, court of first instance for tenants-in-chief.
  - Common Council = a large session of the permanent council, and hardly distinguishable from it.
- β. Theoretic Council of all landowners.

II. MAGNA CARTA

- α. Curia Regis
  - Permanent Council = court of appeal, court of first instance for tenants-in-chief, court of equity, court of summary relief, an executive of agents, a legislative.
  - Law Courts (Curia Regis) = Court of King's Bench (Curia Regis), Court of Common Pleas, Court of Exchequer.
  - Courts of Officials = court of High Steward, court of Marshal, court of Constable, &c. &c.
- β. National Council, with certain rights as a court of appeal and as a court of first instance for tenants-in-chief.

II. THE PRIVY COUNCIL.

I. **ORIGIN**. After the **minority of Henry III.** 'we first distinctly trace the action of an INNER ROYAL COUNCIL, DISTINCT FROM THE CURIA REGIS as it existed under Henry II., and from the Common Council of the realm. The king's **personal advisers** begin to have a **recognised position** as a distinct and organised body.'[1]

[1] Stubbs, *Const. Hist.* ii. 40.

During this minority, too, the **power of the National Council greatly increased**, owing to its **retention** of several powers which had originally been shared with the Consilium Ordinarium, and owing to the **acquisition of new ones.**

During the **minority** the **National Council** was consulted formally on the **appointment of ministers.** *E.g.* **1216.** 'The barons of the realm by common assent chose the **Earl of Pembroke** to be **rector regis et regni.**' **1226.** The Common Council **appointed** Ralph Neville chancellor. Thus it obtained a **hold** on the **ministry** and the council, which later became important.

∴ *a.* The **National Council** had the rights now—1. Of consenting to the appointment of **ministers**; 2. Of appointing a **regent**; 3. Of **removing** their ministers again; 4. Of consenting to **taxation**; 5. Of assisting at **legislation**; 6. Of **trying tenants-in-chief.**

β. The **Ordinary Council** was now—1. A council of **regency** during the minority; 2. A council of **ministers** during the majority; but in both cases to some extent **dependent** on the National Council; 3. A **legislative** body to some extent; 4. A court of **appeal** and **summary relief**; 5. A court of **equity.**

Note on the **Chancery**, &c.

1. *a.* In fact, though most judicial business had been transferred to the law courts, yet there were certain cases **not provided for by the common law**, which were managed in consequence by the **chancellor** and the council as a court of **equity.**

   β. Also when **the offender was so strong that the ordinary law courts were unable to touch him**, the council interfered as a court of **summary relief**, and in this capacity it would be presided over by the chancellor as the highest legal officer.

   γ. Also, in the court of **appeal**, if the king was not present, the chancellor presided, and to him as business increased most **petitions for graces** were referred.

2. It is evident, therefore, that though the **chancellor** was tending to become the **head** of a **separate equitable jurisdiction**, there were **strong ties** to bind him to the council; nor was there really much difference at first between the equity court and the council as a court of summary relief. 'This connection was **strengthened**[1] by

[1] Dicey, *Arnold Essay.*

the fact that it was the chancellor's **peculiar duty** to affix the Great Seal to the **royal grants**, and that the passing of royal grants was a **prerogative** on which the **advice** of the whole council was frequently taken,' and that whenever the council acted it did so by means of a **writ** issued by the chancellor.

∴ **Connection between Chancery and Council**—1. Passing and sealing **royal grants**; 2. Issuing **writs**; 3. **Presiding** over council in its judicial aspect; 4. Receiving **petitions** for graces.

3. **Separation.** As the **other courts** branched off, so did the **Chancery. Pressure of business** and **distaste for subtleties** of legal discussion made the council glad to refer matters of law to the chancellor, and gradually leave them to his decision.

The **ordinance of Edw. III., 1346**, which referred matters of grace to the chancellor's decision, marks the **establishment of the separate court of equity.** From this time he decided matters of **equity** on his **own authority**, and gave help to those prevented by violence from obtaining relief at law.

Still a close union necessarily existed between the council and the chancellor.

It is probable that the **events of Henry's minority** had a considerable effect in creating the idea of **limited monarchy** which almost immediately springs into existence.

In fact, the result of the regency naturally was the growth of the theory that the **king can do no wrong, and his ministers must be responsible.**

The **ministers** became a **regular body** of paid officials, bound by a Parliamentary oath, and meeting under precise conditions by a regular summons.

E.g. **Edw. I. 29**, the **names** of the king's principal councillors are mentioned; **Edw. III.**, a **clerk** of the council is mentioned; Acts are passed with its consent as well as that of Parliament, as though it were a **separate estate. In fact, the council was becoming a distinct body.**

The result of the defining process of the 13th and 14th centuries was that the **Council**, the **Parliament**, the **Law Courts**, and the **Chancery became distinct bodies**, while a **struggle began between Parliament and the Council**, the former striving to control the action of the latter.

II. **STRUGGLE BETWEEN COUNCIL AND PARLIA-**

MENT. Causes 1. Growth of theory **that king can do no wrong**; 2, and that the **king ought not to impose taxation without consent of National Council.**

∴ **Desire** to **control** ministers (or council), and thus control the king, whom they could not directly.

3. **Growth of the powers** of both councils, and consequent hostility.

4. **Hostility** between the **common lawyers**, (whose influence was great in Parliament) and the **civil lawyers**, (who were powerful in the Chancery and council).

Results. Four modes of **exercising** this **control** were therefore attempted in turn. These were—

1. **The claim to elect great officers in Parliament.** In **1244**, and several succeeding years, the barons claimed the right of **choosing** the justiciar, chancellor, and treasurer. The king, however, saw clearly that this would **practically deprive** him of all **power**, and so pertinaciously refuted the proposal.

The barons in **1258** appointed Hugh Bigod justiciar. 'Communi consilio constituerunt Hugonem Bigod **justitiarium** Angliæ.'

Under a strong king like **Edward I.** it is not likely that such an obnoxious claim would be advanced.

It was revived, however, in the next reign.

The Ordinances (XIII.–XVIII.) 'All **great offices** of state in England, Ireland, and Gascony are to be filled up by the king with the **counsel** and **consent** of the **baronage.**'

It dropped under Edward III., but was brought forward again in the **minority** of **Richard II.** The Commons of his first Parliament petitioned that the chancellor, treasurer, chief justices, chief baron, and other important officers might be **appointed** in **Parliament.**

It was frequently and unsuccessfully advanced during the reign, but it dropped into **disuse**, being impossible to maintain; '**for the personal influence of the king would overawe any ordinary minister, and a minister who could overawe the king would be dangerous to the liberties of the country.**'[1]

2. **Oath of office.** The barons in **1258** tried to bind the consciences of the ministers appointed.

E.g. **Oath of the justiciar.** 'He swears that he will well and loyally, according to his power, do that which belongs to the justiciar of right to hold, to all persons, to the profit of the king and the kingdom, according to the provision made and to be made

[1] Stubbs, *Const. Hist.* ii. 560.

by the 24, and by the council of the king and the great men of the land, who shall swear in these things to aid and support him.'

This was obviously **derived** from the old practice of the king's **coronation oath**, and the oaths of the sheriffs. It failed, however, because it was so obvious that **an oath would not bind the conscience of an unscrupulous minister**, and that it was not necessary to bind a conscientious one.

3. **Impeachment.** This was a means of **punishing** refractory ministers, and carried with it the **evil** that it was necessary that a minister should **misgovern very flagrantly** before he could be impeached.

It was derived from the **proceedings** of the kings themselves. **Henry III.** had ruined **Hubert de Burgh.** **Edward II.** revenged himself on **Walter Langton.** But in all these cases as a rule the penalty suffered was pecuniary, and the man's reputation does not seem to have been tarnished in consequence.

This **practice**, however, coupled with the growth of the **theory** that the king can do no wrong, **directed all the national hate, or popular violence, towards the ministers alone.**

When, therefore, **Stapledon**, the ex-treasurer, and **Baldock**, the chancellor, were attacked in 1327 by the nation, and punished for the offences of Edward II., it was to some extent an enunciation of the principle that ministers are responsible for what they do, even though it be by the king's command.

In 1376 this principle was more **regularly** advanced, when the **Good Parliament** proceeded to impeach **Latimer, the chamberlain, Neville, the steward, Lyons, and Alice Perrers.**

In **1386** the Commons impeached **Michael de La Pole.** 'His condemnation showed that great officers of state must henceforth hold themselves **responsible** to the **nation** as well as the king.'[1]

While the impeachment and condemnation of **Sir Simon Burley** and the other courtiers in **1388** shows that the **king** can no longer **defend** his **favourites** against the Parliament.

This right, which was again used against **William de La Pole** in 1449, contained the **defect** that it was too **violent** a measure for **ordinary** use, and would only be put in force to punish **excessive tyranny or misgovernment.** It is obvious, therefore, that, provided ministers kept within certain limits, they had **nothing** to **fear** as a punishment for misgovernment.

It dropped into disuse during Tudor times, owing to the preference those monarchs had for the more rapid and decisive **Bill of Attainder**, and owing to the **subserviency** of the Commons, which prevented the latter using it themselves.

[1] Stubbs, *Const. Hist.* ii. 563.

It was revived again in 1621 by the impeachment of **Mompesson** for monopolies, **Michell** for misuse of justice, **Bacon** for bribery, and **Floyd** for speaking disrespectfully of the Palatine.

The case of **Floyd** also served to finally **discriminate the rights of the two Houses**, which had been to some extent settled in 1 Hen. IV. The Commons proceeded to try and condemn Floyd, when the Lords interfered, claiming that as their right. It was decided at last that the power of accusation belongs to the Commons, that of **condemnation to the Lords**.

This **revived** right was finally **confirmed** to the Commons by the impeachment of **Middlesex, the treasurer, in 1624**, under the auspices of Charles and Buckingham.

4. **The claim to elect the council.** The **multiplication** of the **powers** of the council, which continued steadily, produced a **claim** on the part of the Parliament to **nominate** its **members**. Moreover, as the various plans to control ministers by election, by oath, or by impeachment, failed, or practically were of little use in ordinary circumstances, by claiming to elect the council itself they hoped more **effectually** to control the executive.

The **24 Lords of the Provisions of Oxford**, and the **Lords Ordainers**, are instances of irregular councils which expressed this feeling. But in all these cases the process by which they were forced on the king was entirely **revolutionary**.

The weakness of **Henry IV.** laid the ground open for Parliament, and the **demand** that the **members** of the king's council should be **nominated** in Parliament, and take certain **oaths**, was invariably made when the affairs of the State did not work satisfactorily.

1404. After Hotspur's rebellion, at the **request of the Commons**, the **king named** 6 bishops, a duke, two earls, six lords, including the treasurer and privy seal, and seven commoners as a council.

1406, 1410. He **nominated** a council under similar **pressure**.

Henry V. acted **consistently** on this principle, and his **perfect accord** with the Parliament enabled him to rule in his absence by the council without any difficulties as to its composition.

Under **Henry VI.** the **council of regency** was elected in Parliament. After Henry came of age, the Parliament **forgot** or **did not care** to exercise any influence in the selection of the council. In 1437 the **king** had begun to **nominate absolutely**, and the council once more became a mere instrument in the hands of the king or court.[1]

[1] Stubbs, *Const. Hist.* iii. 248.

The **result**, therefore, of this **long struggle** between the Parliament and the council was, that though all **plans** to obtain a real control over the executive **failed** or **dropped into disuse**, yet a **powerful weapon** was forged wherewith to attack individual offenders. This weapon, **impeachment**, later enabled Parliament to **exercise some indirect influence on the whole executive through the individual parts.**

III. **POWERS. Close Rolls, Hen. III.** 'It had a **direct jurisdiction** over all the **courts** below, with the power of **reversing** any judgment of these courts founded in error.'

'Whenever the **council** thought it **expedient** to have the **advice** and **assistance** of any particular persons, whether barons, bishops, or others, the **chancellor**, by order of the council, issued **writs** of summons to such persons according to circumstances.'

And if any **information** was required, **writs** and **commissions** issuing from the council were despatched out of the Chancery, and the **inquisitions** made by **virtue** of such writs being presented to the council, **instructions** upon the matter at issue were thereupon delivered as the case required.

'**Conventions, recognisances, bails**, and **agreements** were also made before the council.

'**Oaths, vouchers**, and **protestations** were also made before it.

'**Orders** for **payment of money** were issued from it.

'**Judgment** was given in matters tried before it on petition.

'**Persons** were **ordered** to **appear** before the council to show **why** they opposed the execution of the king's precepts.

'**Persons** aggrieved, to state their complaints; and the **aggressors** were commanded to appear and **answer** to the charges preferred against them.'

Annals of Burton. Oath of council, 1257. They swear 'to give faithful counsel, keep secresy, **prevent alienation of ancient demesne**, procure justice for rich and poor, allow justice to be done on themselves and friends, **abstain from gifts** and misuse of patronage and influence, and be faithful to the queen and the heir.'

Fœdera I. 1009. Oath under Edw. I. They swear 'to give, expedite, and execute faithful counsel; **maintain, recover, increase**, and **prevent the diminution of royal rights**; do justice honestly; take no gifts in the administration of justice.'

These extracts show the general powers and duties of the council.

Its more **important** rights were:

1. **Executive.**[1] This was its **primary** function, to **carry** out

[1] Stubbs, *Const. Hist.* iii. 247.

the **will** of the king. During the minority of Henry III. it was practically a **council of regency**. From this time it continually **increased** its power, retiring under strong kings and coming forward under weak ones. 'Under **Richard II.** it became a **power co-ordinate with the monarch**, joining with him in all business, and even restricting his action.' The **control** which **Parliament** obtained over its nomination under Henry IV. and Henry V. rendered it **subordinate**; but still it acted during the **absence** of the latter as a **regency**. In the first year of Henry VI. a **real council of regency** was **nominated** in Parliament to carry on the government. This body exercised the rights of sovereignty during the minority, and latterly became an **uncontrolled executive**, which power it retained, owing to the weakness of Henry and the remissness of Parliament. The **power** of the **council**, therefore, during this reign tends to **increase** until it becomes the **real ruler** of the kingdom.

2. **Legislative.** Under the **Edwards** the council had a **real share** in **legislation**. Its consent is quoted in many cases as well as that of the Parliament, as though it were a separate estate. **Ordinances**, moreover ('which are next in force to a statute,[1] and differ from it only that they have not the consent of the Commons'), were passed with its **advice** and **consent** alone, which were binding on the community. The power of ordaining **relaxations** of the **statutes of the Staple or Provisors** was granted to the king in council.

3. **Financial.** **Financial business** was entrusted to them early in the Lancastrian reigns. The whole **royal expenditure** passed before them for **audit**. They were continually consulted as to the best mode of **raising money**. They were empowered by Parliament to give **security** for loans. In fact, the history of Henry VI. is mainly a record of various **expedients** adopted by the council to raise supplies.

4. **Judicial.** After the definite separation of the Chancery from the council there were **few judicial rights** left, but these were very **important**, and were continually **protested** against under Richard II. The council still acted as a **court of appeal**. It was also in the habit of summoning before it **great offenders**, who transgressed the peace by private war and rioting, and who were too powerful to be coerced by ordinary tribunals.

E.g. **Earl of Devon and Sir W. Bonville**, 1441. And the **inability** of the council to **enforce** this right during Henry VI. was a bitter cause of complaint, and was one of the

[1] Broom, *Const. Law*, p. 380.

chief causes of the '**lack of governance**'[1] which overthrew the last Lancastrian.

5. **Aliens and trade.**[2] The council acted as the **instrument of prerogative.** The **king's rights** as regarded **foreigners** were practically **unlimited.** Naturally, therefore, they had unlimited control over aliens.

They also regulated the **staples**, granted **licenses** to trade, exercised the privilege of erecting and destroying **guilds**, and of impressing **forced labour.**

6. **General.** Their power was **coextensive** with **royal prerogative**, all exercise of which was a matter of advice in this assembly. Under a king whose powers were strictly **limited** by Parliament their powers would therefore be **restrained** considerably.

IV. **ZENITH. Causes.** 1. A council of some kind was **necessary**, and the **king's choice was practically limited. Certain officials** were **necessarily** in it, and their offices were **hereditary.** The **2 archbishops** claimed a **prescriptive** right. Several **bishops necessarily** were there, for some offices (as chancellor) could only be filled by an ecclesiastic. **The council, therefore, was not a mere assembly of paid officials**, but there were great elements of independence in it.

2. Under Henry VI. the councillors were all **nobles**, and were **appointed usually for life.**

3. The weakness of Richard and Henry IV. **raised** the **council** at the **expense** of the king. The foreign wars of Henry V. and his accord with Parliament threw great power into their hands; and the **minority of his son** made them the **practical rulers** of the kingdom.

Results. Therefore, though during the first two Lancastrian reigns the council is **subordinate** to Parliament, under the third it becomes an **independent** executive.

This power was committed to a **select body of the ordinary council, sworn and paid**, who were habitually present, and who really ruled.

This small inner council was called the **Privy Council.**

E.g. 1422. The Protector, Duke of Exeter, 5 bishops, 5 earls, 2 barons, and 3 knights, were nominated in Parliament as a council of regency, '**to exercise all the powers of sovereignty during the minority.**'

[1] Stubbs, *Const. Hist.* iii. 270. [2] Dicey, *Arnold Essay.*

1437. The king nominated absolutely, independently of Parliament.

1444. **An ordinance** practically ensures that every grant of the crown, from its presentation as a petition to its issue as a writ, should pass directly at every stage before the council. **This date marks the height of the power of the council** as an **independent** body.

Thus the council practically REIGNED over the kingdom; but their INABILITY TO RULE it allowed disorder and violence to reach such a height that to many any change of government would seem a good thing. **This lack of governance formed the** STRONGEST PLEA **for the House of York.**

III. AGE OF COUNCILS.

I. **POSITION.** From the accession of Henry VII. to 16 Car. I. the **history** of the **council** is the **history** of the **royal power.** The council becomes completely **subservient** to the **king,** who makes use of it merely as a body of **ministers.** All opposition has crumbled away in the wars; the king therefore can fearlessly increase the power of the council, as thereby he merely **increases** his **own authority.**

II. **CAUSES OF SUBSERVIENCY.** 1. All opposition in the kingdom is gone. The **nobles** had been nearly **exterminated** by the wars, or by the forfeitures of Edward IV. Those who were left were too few, or too timid, to resist the king's will. The **Church,** severed from the people and thoroughly hated, **depended** entirely on the king. The **Commons,** deprived of their leaders, were **unable to act for themselves.** There was **no power,** therefore, to control the council and the prerogative.

2. **Edward IV.** had mingled with the barons in the council **a number of new men** on whom he could rely. **Henry VII.** and his successors **introduced commoners into the council,** knowing that their entire subserviency would render the council more tractable than if it were composed solely of nobles and bishops.

E.g. **1553** the council consisted of 40 members, among whom were **22 commoners** and 2 judges.

The **helplessness** of all classes rendered the **king's** will **supreme.**

The result was a **slavish obedience to any will strong enough to curb them.**

E.g. Their slavish obedience to Henry's will in the **distribution of lands.**

E.g. Their raising **Somerset to supreme power,** and sinking themselves from colleagues in the regency to a mere council.

E.g. Their **inability** to give effect to their hatred for Somerset until Warwick showed them the way.

E.g. Their **acquiescence** in Warwick's scheme for the succession.

III. **POWERS.** As their dependence increased their power increased, for any augmentation of their authority implied the **further extension of the prerogative of which they were merely the instruments.**

1. **3 Hen. VII.** revived and **extended** the old **coercive** power of the council to suppress **rioting, livery,** and **maintenance.**

2. **Poyning's Act, 1495,** reduced **Ireland** practically to the **control of the council,** by decreeing that 'in future no Parliament should be held without the king being officially informed of it; and that no acts should be introduced without having previously received the approbation and **license of the king under the Great Seal.**'[1]

3. **Jersey and Guernsey** were placed in the same position.

4. 'The **Act of Supremacy**[2] had empowered Elizabeth to execute **ecclesiastical jurisdiction** by means of **commissioners** appointed under the Great Seal. Several temporary commissions had sat under this Act with continually **augmented** powers. In **1583 44 commissioners** were appointed (12 bishops) and invested with almost **unlimited** authority on questions of Church government and discipline. Its proceedings were very **arbitrary.** Persons brought before it were compelled to **answer on oath,** and thus criminate themselves, contrary to the maxims of the common law. This court, which consisted mainly of **privy councillors** and **depended** on the council, was the **High Commission Court.**'

5. The **Court of the North,** moreover, originally established in 1536 after the great Northern insurrection, was organised by **Wentworth** in **1627** into an **arbitrary court** on the model of the Star Chamber, with a right of staying proceedings at common law by **injunction,** and of **apprehending** persons by its serjeant in any part of the realm.

6. The **Court of Wales** was created by James I. to withdraw

[1] Bright, *Eng. Hist.* ii. 362. [2] *Ibid.* 568.

the **four counties** of Hereford, Gloucester, Worcester, and Shropshire from the ordinary jurisdiction of common law, on the plea that they were the Welsh marches. These two courts of the North and Wales brought **one-third** of England directly under the **jurisdiction of the council.**

7. The constant aim of the kings was to give their **proclamations in council** the force of law. This custom, which was really a **revival** of the ordinary power of the council, was largely employed during all the Tudor and Stuart reigns. **1539 Henry VIII.** obtained from Parliament a **statute** conferring on him this right. It was, however, **repealed** in the next reign; and so is merely a **landmark** which points out the **illegality** of proclamations innovating on the law. In spite of this, however, and the opposition of Coke in the **case of proclamations,** they were frequently employed.

8. On the death of Henry VIII. the council appears as a **regency.** Sixteen councillors were appointed executors of his will. **Somerset,** however, contrived to make himself **supreme,** and reduce the executors from the position of colleagues and merge them again in the general body of the council.

IV. **STAR CHAMBER.** 1. **Origin.** The **Act 3 Hen. VII.** created a **committee** of the council, with **extensive powers** to punish **great offenders** and especially to take cognisance of **livery** and **maintenance.**

'This Act appears intended to place on a **lawful** and **permanent basis the jurisdiction of the council**'[1] **(which had always existed** over this class of offences.)

After reciting that combinations for unlawful purposes were supported by giving livery, and that the ends of justice were defeated by the interference of **maintainers,** it empowers 'the **chancellor, treasurer, and keeper of the Privy Seal,** or any two of them, with a bishop and temporal lord of the council, the chief justices of King's Bench and Common Pleas,' to **call** before them any such offenders and **punish** them.

This **committee** became **merged** in the general authority of the council until the **Court of Star Chamber** was merely the council in its most arbitrary judicial aspect.

The **date** of this merger **cannot** be **fixed** exactly.

E.g. **21 Hen. VIII.** describes the committee as a **separate tribunal** from the council.

E.g. **Sir Thomas Smith,** writing in the early part of Elizabeth's reign, refers to the **later Court** of Star Chamber (or council

[1] Dicey, *Arnold Essay.*

in its judicial aspect), and ascribes the establishment of its jurisdiction to **Cardinal Wolsey.**

If Sir T. Smith, therefore, is right, the **change must have already begun when the statute 21 Hen. VIII. was passed.**

2. **Jurisdiction.** At first it dealt only with great offenders, but gradually it **extended its jurisdiction to take notice of every kind of offence,** all of which were punished with savage ferocity.

E.g. **Sir Thomas Smith**: 'It is the effect of this court to **bridle** such **stout noblemen** or **gentlemen** which would offer wrong by force to any men and cannot be content to defend the right by order of law.'

E.g. **Lord Bacon**: 'It took **cognisance** of forces, frauds, crimes various of stellionate, and the inchoations or middle acts towards crimes, capital or heinous, not actually committed or perpetrated.'

E.g. They were also accustomed to **punish** 'scandalous reports of persons in power and **seditious** news.'

E.g. 1585 a **complete censorship of the press** was established. The whole **printing trade** was put under **superintendence** of the **Stationers' Company,** while nothing was to be published without permission from the bishops. This regulation was issued by **proclamation.**

E.g. **Prynne, Burton, and Bastwick,** for writing books in which the bishops were vilified in rather strong language, were brought before the **Star Chamber,** fined, cropped, and imprisoned beyond seas, 1632.

The **only punishment** the Star Chamber could **not** inflict was **death,** but by **fining and imprisoning juries** who gave verdicts contrary to direction they were **practically** able to **enforce** this punishment also.

E.g. The jury who acquitted **Sir Nicholas Throckmorton,** 2 Mary, were committed to prison. Those who acknowledged their offence were released. Those who did not were **fined** heavily.

V. **DECLINE.** Under the Tudors the council was a **powerful instrument of government,** and conduced greatly to the increased exercise of prerogative.

But the **arbitrary extension** of its powers under the Stuarts at a time when Parliament, awakening from its long lethargy, was entering on the career of reform, produced its fall.

Government by Parliament and the Star Chamber was incompatible; and after a long **struggle,** in which twice the

kings triumphed over the Parliament, the Star Chamber **fell** unregretted.

16 Car I., one of the most **important** acts of the Long Parliament was the **abolition of the Star Chamber.** With it fell all the other courts dependent on it, and it was not restored at the Restoration.

Thus **most of the judicial powers of the council were swept away.**

IV. THE COUNCIL AND CABINET.

I. **THE COUNCIL.** The result of 16 Car I. was to transform the council into a **purely political body.** Charles II., on reorganising the council, admitted to it **every prominent man of all parties,** so that it consisted of a heterogeneous collection of courtiers, Presbyterians, Cromwellians, and the Queen Mother's party.

It was far **too numerous and motley** to admit of the regular transaction of business. The result was that Charles fell into the habit of discussing and settling what was to be done with an **inner junto, cabal, or cabinet** of his own friends, or of the most important men. The result of these deliberations was then communicated to the council. Naturally, therefore, the **council lost a great deal of its importance** as an executive, tending constantly to become a mere **revising** body.

This CABINET, however, did not **necessarily** consist of men **agreeing** in political opinions. Moreover, there was but **slight responsibility** to the people. While the command of the king was of sufficient weight to overpower the scruples of the minister, or even his opposition.

E.g. **Danby**, desiring war with France, executes a **secret treaty** with Louis at the king's command.

E.g. The Commons **impeach** Clarendon and Danby, but **cannot prevent** the king intriguing with France.

The **result** of this system at first was the **loss of all check** on the action of the king, owing to the **defeasance** of the Privy Council and the **defective responsibility** of the Cabinet.

It was in view of this danger that **Sir William Temple devised his scheme for restoring the council, 1679.**[1] The **Cabinet** was to be increased to **30**, among whom were many of the Opposition, notably Russell and Essex, while Shaftesbury was made president. **Without the advice of this council**, the king pledged himself **not** to act.

The plan, however, failed. The number was **too large** for

[1] Bright, *Eng. Hist.* ii. 753.

rapid or secret action. **Temple, Sunderland, Essex,** and **Halifax** practically formed an **inner cabinet.** The Opposition members refused to be included in the administration without having a voice in it, and the council broke up.

The Cabinet therefore triumphed over the Council, and from 1679 no attempt has been made to render the Privy Council responsible for the crown's political acts.

II. **THE CABINET.** The **transition period** of Charles II. had established the **principle** of the Cabinet, but not the principle of responsibility or uniformity.

William III., succeeding to James II., **imagined** he succeeded to the old Stuart **prerogatives,** and endeavoured to rule **irresponsibly** with a mixed Cabinet.[1] The **impossibility** of this led to his using a **united Cabinet** at times. His personal government led to an **attempt to rehabilitate the Privy Council.**

E.g. **Act of Settlement.** 'All matters relating to the well governing of this kingdom, which are properly cognisable in the Privy Council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon **shall be signed by such of the Privy Council as shall advise and consent to the same.**'

The **principle** being that as the **Cabinet** could not be touched, **not having a constitutional existence,** the **Privy Council** should be rendered really **responsible.**

Marlborough and Harley both ruled by **mixed Cabinets,**[2] and it was only at the downfall of each that a really united Cabinet existed.

The ignorance of George I.[3] with regard to the English language and constitution, **his carelessness,** and the support of the Whigs threw him into their hands, while **his prejudices** would not admit any of the Tories. A really united Cabinet therefore ruled, **responsible** (except in very exceptional cases) **solely to the king; nor was it till the Reform Bill of 1832 was passed that any responsibility to the people existed.**

V. THE PRIVY COUNCIL (modern).[4]

3 & 4 Will. IV. transferred the few remaining judicial rights of the council to a **Judicial Committee** consisting of the Lord President, the Lord Chancellor, and some other officials.

Their judicial powers are:

[1] Hallam, *Const. Hist.* iii. c. xv.
[2] Bright, *Eng. Hist.* iii. 916–923; Hallam, *Const. Hist.* iii. c. xvi.
[3] Hallam, *Const. Hist.* iii. c. xvi. [4] Stephen's *Commentaries.*

1. **Colonial** causes (original and appellate).
2. Appeals in matters of **lunacy**, or from the **ecclesiastical** or **matrimonial** courts.
3. Determination concerning the **possession** or the **charters** of provinces outside the realm.

Their other powers are :

1. As the **Board of Trade** Committee.
2. As the **Education Committee.**
3. As the **instrument of prerogative** in all cases.

E.g. Issuing proclamations is done through the council.

Privy Councillors are made by the sovereign's nomination **for his life and six months after, but subject to removal at his discretion.** All the great officers of the crown are Privy Councillors.

Their duties are (1) to give honest counsel, (2) to keep the king's counsels secret, (3) avoid corruption.

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